Supreme Court, U.S.
FILED

06-897 DEC 27 2006

OFFICE OF THE CLERK

No.

IN THE
Supreme Court of the United States

KENNETH W. JOHNSON,

Petitioner,

v.

MARRION BARRY JR. MAYOR OF THE DISTRICT OF COLUMBIA, *et al.*,

Respondents.

On Petition For Writ Of Certiorari
To The District Of Columbia Court Of Appeals

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Kenneth W. Johnson
Pro se litigant of Record
9803 Allenford Circle, Apt. 203
North Potomac, Md. 20850
Telephone: (240) 314-7188

TABLE OF CONTENTS

Appendix A

District of Columbia Court of Appeals
Memorandum Opinion and Judgment
Kenneth W. Johnson v. District of Columbia,
04-CV-115 & 04-CV-442 (November 21, 2006).....1A

District of Columbia Court of Appeals
Memorandum Opinion and Judgment
Kenneth W. Johnson v. District of Columbia,
04-CV-115 & 04-CV-442
(September 28, 2006).....2A-5A

Appendix B

Superior Court of the District of Columbia
Order denying Plaintiff's Request
For Oral Argument and Motion to Vacate Prior
Judgment Under Rule 60(b)
(January 12, 2004).....6A-8A

Appendix C

Superior Court of the District of Columbia
Order denying Plaintiff's Motion
for Reconsideration and Motion to Admit
Videotape Evidence (March 24, 2004).....9A

Appendix D

Superior Court of the District of Columbia
Order Granting Motion to Dismiss
Plaintiff's Complaint (July 15, 1998).....10A

Appendix E

Superior Court of the District of Columbia
Complaint in Civil Action 3837-98
Kenneth W. Johnson v. District of Columbia
(TH[E] COMPLAINT) (May 21, 1998) 11A-24A

Appendix F
Affidavit of Service served Marion Barry, Jr.,
Mayor or the District of Columbia.....25A

Appendix G
Affidavit of Service served
Corporation Council of the
District of Columbia 27A

Appendix H
Affidavit of Service served
DC Metropolitan Police Department 29A

Appendix I

Defendant District of Columbia's Motion
to Dismiss Plaintiff's Complaint, or in the
Alternative, for Summary Judgment.....31A-32A

Appendix J

Memorandum of Points and Authorities in
Support of Defendant's Motion to Dismiss,
or, in the Alternative, for
Summary Judgment.....33A-36A

Appendix K

Superior Court for the District of Columbia
Acquittal and findings of fact,
United States of America vs.
Kenneth W. Johnson
(December 12, 1997).....37A-43A

Appendix L

Superior Court for the District of Columbia
Complaint in Civil Action 3875-98
Kenneth W. Johnson v. James O'Boyle
(Temporary Restraining Order)
(May 22, 1998).....44A-47A

Appendix M

Superior Court Rules – Civil (SCR-Civil) Rules,
Introductory Note: Rules 1-86 hereof are
derived directly from the correspondingly
numbered Federal Rules and are in many
cases identical thereto.....48A

Appendix N

Superior Court Rule of Civil Procedure 60(b)
(which is identical to Federal Rule of
Civil Procedure 60(b)).....49A-50A

Appendix O

Federal Rule of Civil Procedure 60(b).....51A-52A

Appendix P

TITLE 42 U.S.C. § 1983.....53A-55A

Appendix Q

14th Amendment to the
United States Constitution.....55A

Appendix R

DC CODE 12 § 309.....56A

Appendix S

HAZEL-ATLAS GLASS CO. v.
HARTFORD-EMPIRE CO.
322 U.S. 772, 64 S.Ct. 1281.....57A-78A

Appendix T

JOHN DEMJANJUK, v.
JOSEPH PETROVSKY, et al.,
F.3d 338; 1993 U.S. App. LEXIS 29694;
27 Fed. R. Serv. 3d (Callaghan) 437.....79A-116A

Appendix U

En Banc decision of the United States Court of
Appeals for the District of Columbia held:
"We hold that appellant's noncompliance
with 12 D.C. Code § 309 cannot bar his
federal claims."—*Brown v. United States*,
239 U.S.App.D.C. 345, 356-357.....117A-143A

Appendix V

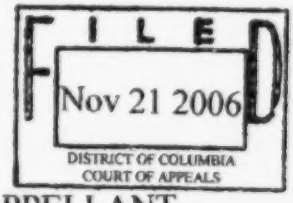
Attorney James A. DeVita: The former attorney for the District of Columbia is now in private practice specializing in, "Fraud-individuals injured due to misrepresentations of facts by others."..... 144A-146A

Appendix X

Pertinent parts of the October 24, 2003 Memorandum that was filed in the Superior Court of the District of Columbia in support of Plaintiff's Rule 60(b) motion to vacate prior judgment on the basis of "fraud upon the court". The memorandum was titled: "MOTION UNDER RULE 60(b) TO VACATE PRIOR JUDGMENT UNDER RULE GROUNDS OF "FRAUD UPON THE COURT" AS HEREIN SET OUT BY THIS MOTION AND MEMORANDUM OF LAW AND POINTS AND AUTHORITIES..... 147A-152A

DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 04-CV-115
04-CV-442



KENNETH W. JOHNSON, APPELLANT,

v. CA-3837-98

DISTRICT OF COLUMBIA, et al., APPELLEES.

BEFORE: Washington, Chief Judge; Farrell, Ruiz, Reid, Glickman, Kramer, Fisher, Blackburne-Rigsby, and Thompson, Associated Judges.

ORDER

On consideration of appellant's *pro se* petition for rehearing en banc; and it appearing that no judge of this court has called for a vote on the petition for rehearing en banc, it is

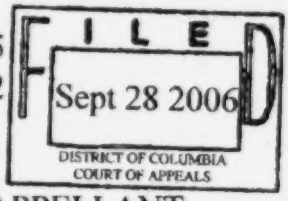
ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

Copies to:
Honorable Michael L. Rankin
Clerk, Superior Court
Kenneth W. Johnson
9803 Allenford Circle
Apartment 203
North Potomac, MD 20850
Todd Kim
D.C. Solicitor General

DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 04-CV-115
04-CV-442



KENNETH W. JOHNSON, APPELLANT,

vi. CA-3837-98

DISTRICT OF COLUMBIA, et al., APPELLEES.

Appeals from the Superior Court of the
District of Columbia
Civil Division

(Hon. Michael L. Rankin, Trial Judge)

(Submitted September 27, 2006 Decided September 28, 2006)

Before FARRELL and KRAMER, *Associate Judges*, and NEBEKER, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PERCURIAM: These appeals are from the denial of appellant's motion under Super. Ct. Civ. R. 60(b) filed over five years after his case had been dismissed, and from the denial of his successive motions to reconsider the denial of the Rule 60(b) motion. The crux of appellant's argument, aside from his numerous assertions regarding the merits of the underlying action, [1] is that the District of Columbia

[1] Appellant sued the Metropolitan Police Department (MPD) — and arguably the District of Columbia — in May 1998 alleging false arrest or malicious prosecution. The Superior Court dismissed the suit without stating reasons, and appellant took no appeal from the dismissal.

committed fraud upon the court by making a number of allegedly fraudulent statements in its June 1998 motion to dismiss his complaint. The trial court found no merit to the claims of fraud, and neither do we. We accordingly affirm.

Rule 60 (b) allows fraud to be asserted as a basis for relief from a judgment in two ways: by motion under Rule 60(b)(3) asserting fraud or other misconduct of an adverse party; and by "an independent action... to set aside a judgment for fraud upon the court." A motion under Rule 60(b), however, must be made no more than one year after the judgment. *See* Rule 60(b); *Olivarius v. Stanley J. Sarnoff Endowment for Cardiovascular Science, Inc.*, 858 A.2d 457, 464 (D.C. 2004). Appellant's belated motion plainly does not qualify for relief under that provision. Nor, as will appear, does it meet the substantive requirements for an independent action for fraud — assuming, solely for the sake of argument, that it was filed "within a reasonable time" after the 1998 dismissal, as Rule 60(b) demands for such an action.

Appellant contends that the District, in moving to dismiss his 1998 suit, made three misstatements amounting to fraud on the court: one, that he had sued only the MPD, which is not *sui juris*, when in fact he also sued the Mayor and the District of Columbia generally; two, that an earlier complaint he had filed in Superior Court, also dismissed, barred the present suit on *res judicata* grounds; and three, that his suit was barred for failure to give the District prior notice under D.C. Code § 12-309, when (he alleged) he raised federal civil rights claims to which that statute does not apply. Our decisions make clear, however, that none of these assertions make out a claim of fraud upon the court sufficient to meet the requirements of an independent action.

The concept of fraud upon the court, we have said, "should be narrowly construed and 'confined to the most egregious cases, such as bribery of a judge or juror, or improper influence exerted on the court by attorney, in which the integrity of the court and its ability to function impartially is directly impinged.'" *Partnership Placements, Inc.*, v. Landmark Ins. Co., 722 A.2d 837, 844 (D.C. 1998) (citation omitted). Moreover, "[f]raud on the court... is fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury. The concept refers only to very unusual cases involving far more than an injury to a single litigant." *Olivarius,* 858 A.2d at 465 (internal quotation marks and citation omitted). Finally, we have held that an independent action under Rule 60 (b) is an equitable one of last resort carrying with it stringent requirements. *See, e.g. Threat v. Winston,* No. 04-CV-191, 2006 D.C. App. LEXIS 511, at *13-14 (D.C. September 21, 2006). Relief in equity is available "only to prevent a grave miscarriage of justice" and "equitable relief will not be granted where the plaintiff has a complete and adequate remedy at law." *Id.* at *16 (internal quotation marks and citations omitted). "[I]f a Rule 60(b) motion is available, there is an adequate remedy and the independent action may be dismissed." *Id.* (internal quotation marks and citation omitted).

Appellant's claims of fraud fall well short of meeting these standards. He alleged no bribery or improper influence exerted on the court, and at most claimed that the District had made questionable legal arguments or misstatements about his complaint — matters that did not "involv[e] more than an injury to a single litigant" and certainly did not portend "a grave miscarriage of justice" (indeed, the adversary process is designed to allow for correction of such statements by an opposing litigant). Moreover, Rule 60(b)(3) furnished appellant with an "adequate remedy of law", one he failed to pursue within

the time permitted. Lastly, as the District points out, appellant never opposed its 1998 motion to dismiss, nor took an appeal from the dismissal, thus foreclosing his claims under the principle that "an independent action for fraud may not be entertained if there was an opportunity to have the ground now relied upon to set aside the judgment fully litigated in the original action." *Olivarius*, 858 A.2d at 468 (internal quotation marks and citation omitted); *see also Fleming v. District of Columbia*, 633 A.2d 846, 849 (D.C. 1993).*

Affirmed.

ENTERED BY DIRECTION
OF THE COURT:
"s/Garland Pinkston, Jr"

GARLAND PINKSTON, JR
Clerk of the Court

Copies to:

Hon. Michael L. Rankin

Clerk, Superior Court

Kenneth W. Johnson, pro se
9803 Allenford Circle, #203
North Potomac, MD 20850

Edward E. Schwab, Esq.
AGDCO

* Because appellant's arguments in support of his motions to reconsider are the same as those made in his Rule 60(b) motion, the trial court did not abuse its discretion in denying those motions. *See, e.g., Wallace v. Warehouse Employees* Union #730, 482 A.2d 801, 810 (D.C. 1984).

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA CIVIL DIVISION

KENNETH JOHNSON,	:	
Plaintiff,	:	Civil Action No. 98-3837
	:	Calendar 2
v.	:	Judge Michael L. Rankin
	:	
DISTRICT OF COLUMBIA, *et al.*,	:	
Defendants.	:	

FILED
CIVIL ACTION BRANCH
Jan 15 2004
Superior Court
of The District of Columbia
Washington, D.C.

ORDER DENYING PLAINTIFF'S REQUEST FOR ORAL ARGUMENT AND MOTION TO VACATE PRIOR JUDGMENT UNDER RULE 60(b)

This matter is before the court on plaintiff's motion to vacate prior judgment and request for oral argument on such motion. Upon consideration of the motion, District of Columbia's opposition, plaintiff's follow-up request, and the record herein, both of plaintiff's motions are, this 12th of January 2004, hereby **DENIED**.

Plaintiff first filed suit against the District of Columbia, the Metropolitan Police Department, and its officers in May of 1998, claiming that defendants had maliciously prosecuted him in criminal court. On July 15, 1998, the court dismissed the lawsuit for plaintiff's failure to comply with the mandatory notice requirements, as stipulated in D.C. Code § 12-309. Plaintiff now moves this court to vacate the judgment under Superior Court Civil Procedure Rule 60(b) on grounds that defendant District had defrauded the court in its opposition to plaintiff's earlier motion.

Although Rule 60(b) permits the vacating of a judgment when so warranted, it was specifically designed to safeguard the finality of judgments; therefore, only in exceptional circumstances will the court grant post-

judgment relief. *Lynch v. Meridian Hill Studio Apts., Inc.*, App. D.C., 491 A.515 (1985). The court, moreover, has broad discretion with which to decide a motion to vacate a default judgment. See *Watkins v. Carty's Automotive Elec. Ctr., Inc.*, App. D.C., 632 A.2d 109 (1993).

Where, as here, the plaintiff asks the court to vacate judgment due to fraud, he must show the following elements with respect to defendants' behavior: (1) a false representation, (2) in reference to a material fact, (3) made with knowledge of its falsity, (4) with the intent to deceive, and (5) action taken in reliance upon the representation. Cobb v. Cobb, 116 WLR 1993 (Super. Ct. 1988). Assuming the plaintiff proves all five of the above elements, the court may then set aside the earlier decree, even if the present case was filed well after the general year-long limitation. Yet it is only in "unusual and extraordinary" or egregious circumstances, which justify overriding the policy of finality, that the court will reverse judgment. See *Starling v. Jephunneh Lawrence & Assocs.*, App.D.C., 495 A.2d 1157 (1985). In such instances, the court will vacate the improper judgment so long as the plaintiff has filed his Rule 60 motion within a reasonable amount of time –"reasonable", here, being defined according to the facts of the case.

In this case, plaintiff alleges that defendant District of Columbia, and its agents, has committed fraud upon the court by making false representations. Plaintiff, however, offers no proof to substantiate this claim. Further, he offers no solid argument showing that he should have been granted judgment the first time around. As the District points out, the plaintiff failed to meet the statutory requirements of D.C. Code § 12-309, in that he neglected to properly notify the mayor of his suit. Notwithstanding the dismissal based on this statutory preclusion, plaintiff thereafter filed a similar suit in District Court. This too was dismissed, although its cause was failure to file within the proper statute of limitations.

In its opposition to plaintiff's Rule 60 motion to set aside the judgment, defendant states that the motion, having been filed much longer than a year after judgment, is out of time and, for that reason alone, should be denied. True, in most instances the court will observe a one-year time limit by which parties must file their motions to reverse judgment. But, as noted above, that rule is not hard-lined, and under extenuating circumstances the court will waive this otherwise enforced deadline. Here, though, plaintiff has not shown that the District has committed any fraud whatsoever and, so, regardless of any time limitation he is not entitled to the requested relief. *

It is so **ORDERED.**

"s/Michael L. Rankin"

MICHAEL L. RANKIN
Judge
(Signed in Chambers)

January 12, 2004
Copies to:

Kenneth Johnson
11103 Knights Court
Germantown, Maryland 20874

Holly M. Johnson
Assistant Corporation Counsel
441 4th Street, NW, 6th Floor South
Washington, DC 20001

---

* In his motion, plaintiff claims that he had, in keeping with 12-309 statutory requirements, notified the Mayor of his suit by naming him in the complaint. Yet, as the law stipulates, mere mention of the Mayor's name does not satisfy the statutory obligation; rather, submission of a letter does.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA CIVIL DIVISION

KENNETH JOHNSON,	:	
Plaintiff,	:	Civil Action No. 98-3837
	:	Calendar 2
v.	:	Judge Michael L. Rankin
DISTRICT OF COLUMBIA , *et al.*,	:	
Defendants.	:	

FILED
CIVIL ACTION BRANCH
Mar 25 2004
Superior Court
of The District of Columbia
Washington, D.C.

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION, SECOND MOTION FOR RECONSIDERATION, THIRD MOTION FOR RECONSIDERATION, AND MOTION TO ADMIT VIDEO TAPE EVIDENCE

The court hereby, this 24th day of March, 2004 DENIES the following motions filed bu plaintiff in the above-captioned case:

- Plaintiff's motion for reconsideration
- Plaintiff's second motion for reconsideration
- Plaintiff's third motion for reconsideration
- Plaintiff's motion to admit videotape evidence

Further, the plaintiff is prohibited from filing any additional motions until further order of this court.

It is so **ORDERED.**

"s/Michael L. Rankin"

MICHAEL L. RANKIN
Judge
(Signed in Chambers)

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA CIVIL DIVISION

KENNETH W. JOHNSON, Plaintiff	:	Civil Action No. 98-3837
	:	Cal. #2 J. Gardner
v.	:	Next Event Sched. Conf. 8/21/98
"D.C. METROPOLITAN POLICE DEPARTMENT" (SIC)	:	
Defendants	:	

FILED
CIVIL ACTION BRANCH
Jul 15 1998
Superior Court
of The District of Columbia
Washington, D.C.

ORDER

Upon consideration of defendant District of Columbia's unopposed motion to dismiss plaintiff's complaint, the record herein, it is ORDERED, that the defendant's motion is GRANTED, this 15th day of July 1998.

"s/Wendell P. Gardner"

WENDELL P. GARDNER
Judge

Copies To:
James A. DeVita
Assistant Corporation Counsel, D.C.
1 Judiciary Square, Room S-86
441 4th Street, N.W., 6th Floor
Washington, D.C. 20001

Kenneth W. Johnson
2122 24th Place, N.E.
Unit B
Washington, D. C. 20018

SUPERIOR COURT OF THE DISTRICT OF
COLUMBIA CIVIL DIVISION

Kenneth W. Johnson
2122 24th Place Unit B NE Washington DC 20018
Plaintiff

CAL 2
v. Civil Action No. 0003837-98

D. C. Metropolitan Police Department.
300 Indiana Ave NW Washington DC 20001
(General Counsel Office) rm 4125

Marrion Barry Jr. Mayor of the District of Columbia
(or designee rm 10-S-04) and
Corporation Council of the District of Columbia (Janes Stokes)
441 4th Street. N.W., 6th Floor South, Washington, D.C. 20001

Defendants

FILED
CIVIL ACTION BRANCH
May 21 1998
Superior Court
of The District of Columbia
Washington, D.C.

COMPLAINT

1. Jurisdiction of this Court is founded on D.C. Code Annotated, 1973 edition, as amended, Sec. 11-921.

See Attachment

Wherefore, Plaintiff demands judgment against Defendant in the sum of $ 100,000,000.00 with interest and costs.

301 497-4428
Phone

DISTRICT OF COLUMBIA, SS
Kenneth W Johnson, being first duly sworn on oath deposes and says that the forgoing is a just and true statement of the amount owing by defendant to the

plaintiff, exclusive of all set-offs and just grounds of defense.

"s/Kenneth W Johnson"

(Plaintiff — Agent)

Subscribed and sworn to before me this 21st day of May 1998

"s/Debra A. Cheek"

(Notary Public/Deputy Clerk)

Debra A. Cheek
Notary Public
District of Columbia
My Commission Expires
August 14, 2001

K.W.J. ENTERPRISES, Inc.
2122 24th Place NE
Washington, DC 20018

May 18, 1998

Dear Chief Ramsey,

This is a formal complaint of misconduct by Police Officers and Officials working on your Department. I would first like to inform you that a 5th District Officer with the last name Rodrigez, I believe if this is not his correct name I would recognize him on sight. This officer attempted on numerous occasions to extort money from me by threating to close down my nightclub, if I did not comply with his demands. Secondly, my nightclub has been frequented a numerous amount of times by an MPD Sgt. His name is Boyle or Doyle, again if I have it wrong I would recognize him on sight. This sergeant along with some officers have been harassing myself, club employees,

and other people, and have in several instances created a malicious interference to my business and that of other businesses involved. There are several companies who make money from these events taking place and there employees as well as me and my employees, adding up to lots of people job's are being affected as well as companies income. Note: in all the years that I have been in business there has only been to date one arrest of any customer of mine which was in the bathroom. I have done everything I could think of to combat any illegal activity. I have wrote the Chief of Police Office requesting them to allow me to have off duty police. I have submitted names of police officers, Lieutenenants, Sergeants, who want to work for me in there spare time. I have purchase $2,400.00 in insurance to cover the DC Metropolitan Police Department against lawsuits as they require to hire there police. I have hired armed SPO companies, I have hired Club Security Personnel. I have posted flyers at Police Stations to hire off duty police and I have personally encouraged police officers countless times to do there jobs and arrest any person they see in or about my club doing anything illegal. On one occasion for example, this past Friday, which was May 15, 1998, the Sergeant Boyle came into my nightclub ordered me out of my ticket booth as I monitored the band's cashier collecting money, of which ½ is paid to me. He then told me that he smelled marijuana in the air in my club. I told him then he needs to arrest anybody he see with any drug or doing anything illegal, after all he is a police officer and has that responsibility. He states to me that if he smells it again he is going to throw my customers into the street, keep in mind we're talking about hundreds and hundreds of people at one time and shut my club down causing thousands and thousands of dollars to be lost at one time that evening alone, not to mention the long term damage it will cause in these people not returning to my business to patronize it, were talking liquid damages in the hundreds of thousands of dollars and even millions if

sustained long enough. Also, out of all these people and the Sgt. Boyle and his officers probing throughout my nightclub on every visit they did not lock up not one person, there are as many as 300 people in my place at one time and through the course of a night there can be as many as 500 hundred coming in and out. To spite my efforts, I have been harassed and my business maliciously interfered with, band members, myself, customers have been forced to give there names to the same people over and over again. This Sgt. Boyle has made a habit of threating me even though he himself has not caught anyone doing anything that he can arrest then for, I don't have a gun or a badge or a police radio, nor do I have his authority to handcuff an arrest people. I cannot take any more threats from this man nor can I allow people jobs to be destroyed because of this Sergeant and other officers: This Sergeant has me terrified to leave my business at 3:00am or 4:00am when it closes, given the history of this and other experiences. I am concerned that in an act of retaliation this man might try to plant some drugs on me or at my business. I should not have to live with these fears. I have a business that is not only legal but is licensed by the DC Government and I have all of the Licenses and Occupancy permits needed to Lawfully operate my business. My right to do so is being breached by your employees, please do something about it before more damage is caused.''s/Kenneth W Johnson''
Kenneth W. Johnson CEO/President

As of May of 1997 I was falsely arrested. I was charged with Operating a Disorderly House, I was later acquitted of the only charge which again was operating a disorderly house. I had the same judge for trial as the one who signed off on my arrest warrant and even though I had no jury he even said no way not guilty. He found that in the three elements necessary to charge me with this crime, two of them did not exist the only one that existed is the government having to prove that the business belong to me

and certainly we do not dispute that I am the owner of the nightclub through my corporation (Corporate President). The judge told the prosecution that in so many words that he struggled not to acquit me base on the prosecutor's case alone. The prosecutor tried to convince the judge they had the right to prosecute me, there is a lot of evidence of wrong doing on the part of the police department in my trial and should be in my transcripts, I will order them soon, I have been told it could take up to six months especially since my trial was tape recorded with no court reporter present. I hope the government won't try to destroy or alter these transcripts in an attempt to limit the consequences of there actions. In addition, to being humiliated by being arrested in front of my nightclub, all of my customers hundreds and hundreds of them were treated unfairly, the police were ordering everybody out as they raided my place. They were all over the street and all over the inside of my club. Prior to this the police department call my Landlord in Virginia Beach, VA and asked for a copy of my lease, which is none of there business and clearly an invasion of my privacy, then told him I was a drug dealer and that I was using his place for illegal activity, think how this made me feel here I have never done anything illegal in my life. I don't even smoke or drink at all. Furthermore, I am licensed by the DC Government to operate my business and I have all the permits and licenses to conduct my business. I had to here all these false accusations from my Landlord's son and be threaten to have my lease terminated as this was my only source of income, you can imagine the fear and stress I went through, being threaten for lies that had been told by the police. The police came in and took all my business records and has yet to return them almost 6 months to date after I won my case. They took $1,700.00 dollars out of my pocket the night they arrested me some of the money I made that night, that I needed to pay my rent creating another hardship for me, it took a court order from a judge

several months after I won my case to get that money back, they knew I had a legal business that the money was earned legally, but took it anyway. The prosecutor never tried to use it against me in court, they just felt they had an excuse to rob me of my money and could get away with it. My defense was based on that what the government is describing to the judge is not even a crime our defense was that even by the government's position if you take everything there saying happened they way they said its still not a crime on my behalf. The government was saying stuff like, if there is a homicide a block away from my nightclub that nobody knows is going to happen that has nothing to do with my own personal actions that I am not even aware of, that know I'm a criminal because I own a business up the street. I never heard of something so ridiculous and neither did the judge as he acquitted me, scolded the police department saying if they spent half the time trying to stop these crimes as they did trying to shutdown my nightclub, we wouldn't have these problems. They set up cameras's ouside my club, video tape my club, ran undercover in and out of the 500 people approximately a night overall those months of doing these things the police caught and locked up one person smoking in the bathroom in fact in all the years I have been in business this is the only arrest of a customer. I have done everything from spending $1,200.00 a year on a issurance policy that insures the police department against lawsuits, so I can hire off duty police as the police department requires to hire there police. I have wrote a lot of letters to the chief of police requesting police assistances. I have passed out fliers at police stations but the officers who want to work for me get turned down by the department. I have hire private security company and club security, which the police admitted. We have very thorough security at my club. We even make people take off there shoes and empty there pockets to get in, we can strip search people so it is not an invincible system, if a girl puts something in her bra or a

guy in his pants we are not going to violate our customers tights, to satisfy the police but we do all we can. The police want to seek revenge against me and this is how they are trying to do it. I am so scared that they are going to try to plant something on me or my business that I am afraid to go to and leave my business. I should not have to live like that when I am doing nothing wrong, nothing they have done has worked so they can't stop me from making legal money so the next thing is to frame me, which I am thankful that they have not done yet. I can remember Det. Hagerdy telling me as we drove to the station after my arrest you know you don't get know jury for this and then laughing as though my life was some cat and mouse game the police were playing. After this devastating experience my customer base collapsed, all my income stopped from this incident from my nightclub. I lost a deal on a car dealership that was in the works as I struggle to save and rebuild my nightclub. The police have harassed me by constantly asking me and the band how much money we make. I was maliciously prosecuted. I had to go out and pay for a lawyer. After winning my case in December 1997, I am still being harassed by the police department in the same ways pursuant to my acquittal as outlined in my complaint against Officer Rodrigez and Sgt. Boyle and other MPD Officers dated May 18, 1998. I have suffered economic harm, and emotional distress.

On October 7, 1994, I had left my vehicle directly in front of 2122 24th Place, N.E., Washington, DC, which is a building being leased by my corporation. The vehicle was a 1990 Mercedes 300E. Sometime that night I road home with my girlfriend Catrina, I was to tired to drive myself home. Then next morning at about 12:00 or 1:00 p.m., I had returned with Catrina and a building inspector, as I approached my car in Catrina's car I observed two police lieutenants in which I do not know standing outside my car, both were tall white males approximately 220lbs. I would

recognized them by sight. At any rate one of these two Lt. order me to pull over and step outside Catrina's car in which I did, he approached and stopped me at Catrina's driver side door, just after I stepped out of the vehicle. He stated that they had searched my vehicle prior to my arrival. I stated to him what is the problem and why did you search my vehicle while I was gone. He stated to me that he found a lot of receipts in my car and demanded to know what I was doing with a lot of receipts in my car, he further more stated that he knows I was suspended for a year without pay and demanded to know where I got the money to be buying a lot of things. . I stated to him that did he know that I my car in court and was found not guilty by virtue of self defense and that I had a police trial board hearing in which two police captains (Wisemen, and Brown) and a police inspector (Lingerfelt), who concurred with the courts after hearing the evidence and concluded that no disciplinary action what so ever would be taken against me. I went on to state that did he know that a few months ago the department back paid me for tine on suspension in one lump sum of about $26,000-$27,000. He demanded over and over again an answer as to why I had receipts in my car. I said to him Lieutenant is there something illegal about having receipts in my car. He stated that I look suspicious and that he might impound my car for an administrative investigation, which I thought to myself how can you take someone's car because you employee them and for no other reason than an administrative investigation. I stated to the Lt. that I have done nothing wrong. He stated to me that he found a stack of credit cards and we might have a possible credit card fraud. I stated to him that well Lt. aren't all the credit cards in my name, he paused and thought about it and said well maybe you reported them stolen and charged on them afterwards, I said well if I had reported them stolen the first thing the banks would do is cancel them rendering them useless, so that dosen't make sense. Also, I told him that they were already

canceled because I couldn't make payments on them because of my one year suspension and attorney fees. He was fishing and trying to come up with anything. I asked if I could see these receipts and see how old each was and how much they were for, I explained that I have a lot of old receipts in my car, nevertheless, he would not let me go to my car after I had requested to be allowed to retrieve and look for in an effort to retrieve these receipts. He denied me this. I then reached in my girlfriend Catrina's car and took out my keys and stated to the Lt. that I am going to let the building inspector in to my building, in which he didn't object so I went to my front door and unlocked it, the building inspector was so alarmed at my interrogation by the Lt., that he though I had done something wrong. He said he was not going in, I said to Lt. look what you have done you have me all upset and the building inspector all upset, he thinks I have done something wrong, and all because I've got receipts in my car and because I have a lot of credit cards. The building inspector spoke up and said I'm not scared anymore, I see whats going on now, what they are doing to you is wrong, you should take legal action against them. I stated that its know way all this could be because of no receipts, I said to him is it because you all don't want me to open a business and make a lot of money. I'm under the strong impression that this is being prompted By jealously, the fact that here the low man on the totum poll just an officer, is trying to open his on business and brighten his financial future and spiritual future, and a black man at that. At least in my eyes this seems like a much more logical reason all though equally as wrong for what happened to me that my privacy was being violated by non consential searches and falsely accused of erroneous and ludicrious accusations. Non-consential searches of my car as well as my building, or rather the building of the corporation to which I am a stockholder and formally represent. Which brings me to the building shortly after I unlocked the door for the building inspector and him only

and after argument in sued between myself and Lt. he and an officer took it upon themselves to rush inti my building and conduct a search while I was to stand out on the front with another Lt. who advised me that the inspector was on his way. When the inspector got on the scene he at some point approached me and the two Lts. By this time the one who did the search with the other officer had come back out just prior to inspector Behilia's arrival I began to explain the inspector in so many words stated that he was not concerned about the past things that the Lt. brought up about my back pay and all that. He asked the Lt. had I done anything criminal and the Lt. said no, so then the inspector said well then let him go, let him go. Also, they had called Lt. Metillo from the second district, which is wgere I am employed as a police officer, to respond to the scene. He apparently was briefed by the other Lt. because he ordered me to hand over my credit cards, in which I complied he then returned them to me after about 15 minutes. I would also like to add that I remember distinctly locking my car door as I always do and my girlfriend remembers me doing it before I left. I never leave my car unlocked not only did I lock my doors, but I secured by steering wheel and brake with a device similar to the club people use in there car, this device locks the steering wheel to the brake, this device was still placed and locked to my brake and sterring wheel. All of my personal papers were all over the floor from the search of my glove compartment, nothing was stolen and no windows were broke or any other physical damage other than the driver side lock cylinder being missing, which still locks automatically with the other locks and this damage was already present prior to me parking my car. This makes it hard for me to believe someone else other than the police broke into my car prior to there search, just to take nothing not even one of the ten credit cards the Lt. was so concerned about. Also, my glove compartment was still open with all the prior contents of it displayed all over the floor of my car. It had been ramsaked, it was not left in this

order. I stated to the Lt. prior to me seeing the inside of the car that sometimes I know I might have some receipts lying around in the car in somewhat of a fashion. This was far beyond that I also would like to state that the Lt. told me and the building inspector that the reason he was at my building was that a burglar alarm was going off in the building. The building inspector and I said him well how come we didn't here it. He certainly doesn't have a code to turn it off. I went back to the second district and with some help did a computer check which revealed that no call for a burglar alarm was ever received by the police department or assignment dispatched to 2122 24th Place, N.E., Washington, D. C. or even one in 2100 block of 24th Place on that day being October 8, 1994. I also explained to the Lt. that legally this building is not being leased by me the lease is between the landlord and a corporation in which I own stock and at such time that it is converted in to a business it will be a business owned by that corporation and not and individual since by law a corporation is view as a separate entity and stockholders do not own the assets and the stockholders own stock. Nevertheless, I believe it says in the 14th Amendment that all U.S. citizens are entitled by right to the right of free enterprise and it also addressed that corporations have the right under the U. S. constitution to free enterprise and to own and operate a business I will make it a point in the near future to obtain a copy of the 14th Amendment and read it thoroughly so that I maybe able to speak on this subject with more precisiveness and will have a clearer focused understanding of this right as set forth and how they may apply to me by the 14 amendment and alleviate any misconceptions that I might have, If I have any. I would also like to say that the inspector Behila told me that he had been hearing in community meetings about the business I had proposed at 2122 24th Place, N.E., and that he though it was a good idea. With exception of this last comment by inspector Behila. This experience has depressed me and made me feel violated. It makes me

wonder how far individuals on the police department primarily officials will go. It makes me think that the next time an official might try to plant something illegal on my property, or something out of spite or jealously or racial prejudice just to try to bring me down or as a retaliation to me taking a stand against what happened any future occurrences. Without a doubt I feel my civil rights were violated. I was restricted from movement from the scene and was not allowed to enter my building or my vehicle I was deprived of my right to go about my way, my freedom was taken away until the inspector Behila order that Lt. let me go and even after the inspector left or disappear from my sight or my awareness of his presents, I was still made to remain. My freedom was further taken from me as I was ordered to give up my credit cards and remain on the scene which I felt I had been arrested, my right to leave under my own will had been taken from me all though I was not handcuffed. I was order to remain on the scene, I was ordered not to go into my building, I was ordered not to go to my car or near it. I was told I was a suspect for something I did not do, I was threaten that my car would be impounded for an administrative investigation and not aloud the return of my right to freedom and free to move on until shortky after the inspector Behila order that I be let go twice (Let him go, Let him go), I quote the inspector, and further interrogation, as I was interrogated throughout this. In addition, the Lt. that I do not know him or his name, who I have been speaking of also questioned me at the end about how much money is my car note, I told him I pay $1,900.00 a month after taxes. This has compromised my piece of mind, I feel like I have been targeted by police officials and eventually they are going to railroad me even if they have to break the Law to do it. I can't even function on my job correctly wondering constantly if my job will be sabotage or some officials will constantly do me on the job for anything possible or have someone do it because of what I am trying to accomplish. I definitely know I have

been targeted. I feel my job is an unsafe place to work, a place of treachery and dishonest and contempt against me. I wish to make a formal complaint of unlawful search and seizure of my car and my building and unlawful arrest, violation of my civil rights, harassment, and defamation of character along with mental anguish, pain and suffering, and racial discrimination. I would like to say that the onr Lt. who's name I do not know of I think I saw the name smith the on his name tag, although I'm not sure but I definitely know him if I saw him.

1. I cannot sleep
2. I want to request stress leave but to scared to.
3. I cannot function on my job properly because of flashbacks constantly wondering where or rather when I will finally be railroad.
4. How long I can survive before being set up or frame because of hate prompted by racial injustice and jealously
5. I cannot sleep at night wondering what will happen next, my nerves are shot because of my job and existence threatened.
6. My driving is effected when flashbacks of what happen occurs such as driving around the same block 7 to 10 times.
7. I mentally blanking out while driving.
8. I notice myself trembling, it is hard to keep my hands still when I'm thinking or having flash backs about what happen and that maybe in store for me.
9. Even my breathing is effected during the stressful periods brought on by this.
10. I blankout when walking through stores, I worry about when they finally railroad me what effect it will have on me and my family, and how will they survive without me and how will I survive after this.
11. I am afraid to come to work.

12. I am afraid and terrified togo to my building that my corporation is leasing and that I am the president of at 2122 24th Place, N.E.
13. I feel unsafe and terrified there if I don't have someone with me as a witness if the police officials come back and do something to me. I am terrified to leave my car unattended for fear that they will break in or jimmy the locks and invade my privacy, try to plant drugs or damage my car or do the same to my building.

SUPERIOR COURT OF THE DISTRICT OF
COLUMBIA CIVIL DIVISION

Kenneth W. Johnson	)	
	)	
vs.	)	No. 98CA003837
	)	
DC Metropolitan Police Department, et al.	)	
	)	
	)	

FILED
CIVIL ACTION BRANCH
May 27 1998
Superior Court
of The District of Columbia
Washington, D.C.

AFFIDAVIT OF SERVICE

to wit: Washington, DC)
)

I, RONALD A. MURDOCK, II, having been duly authorized to make service of the Summons, Complaint, Initial Order, Memorandum dated May 18, 1998 direct to Chief Ramsey, General Order Concerning motions Procedure Effective January 1, 1998 and Notice of Hearing in the above entitled case, hereby depose and say:

That my date of birth is 12-27-72.

That my place of business is 1827 18th Street, N.W., Washington D.C. 20009-5526.

That at 10:27 am on May 22, 1998, I served Marion Barry, Jr., Mayor or the District of Columbia at 441 - 4th Street, N.W., 6th Floor, Washington, D.C. 20001 by serving Herman Bunch, Staff Assistant in Mayor's office, authorized to accept. Described

SEX- MALE
AGE- 30
HEIGHT- 5'10"
HAIR- BLACK
WEIGHT- 160
COLOR- BLACK

I do solemnly declare and affirm under the penalty of perjury that the matters and facts set forth herein are true to the best of my knowledge, information and belief.

"s/Ronald A. Murdock, II"

RONALD A. MURDOCK, II
Our File#- 34376-01

SUBSCRIBED and SWORN to before me this 26th day of May, 1998.

"s/Denise L Daldm"

NOTARY PUBLIC

My commission expires: 11-30-01

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA CIVIL DIVISION

Kenneth W. Johnson)
)
vs.) No. 98CA003837
)
DC Metropolitan Police Department,)
et al.)
)

FILED
CIVIL ACTION BRANCH
May 27 1998
Superior Court
of The District of Columbia
Washington, D.C.

AFFIDAVIT OF SERVICE

to wit: Washington, DC)
)

I, RONALD A. MURDOCK, II, having been duly authorized to make service of the Summons, Complaint, Initial Order, Memorandum dated May 18, 1998 direct to Chief Ramsey, General Order Concerning motions Procedure Effective January 1, 1998 and Notice of Hearing in the above entitled case, hereby depose and say:

That my date of birth is 12-27-72.

That my place of business is 1827 18th Street, N.W., Washington D.C. 20009-5526.

That at 10: 30 am on May 22, 1998, I served Corporation Council of the District of Columbia c/o Janice Stokes at 441 – 4th Street, N.W., 6th Floor, Washington, D.C. 20001 by serving Donice Hancock, Receptionist to Corporation Counsel, authorized to accept. Described herein:

SEX- FEMALE
AGE- 32
HEIGHT- 5'10"
HAIR- BLACK
WEIGHT- 140

COLOR- BLACK

I do solemnly declare and affirm under the penalty of perjury that the matters and facts set forth herein are true to the best of my knowledge, information and belief.

"s/Ronald A. Murdock, II"

RONALD A. MURDOCK, II
Our File#- 34376

SUBSCRIBED and SWORN to before me this 26th day of May, 1998.

"s/Denise L Daldm"

NOTARY PUBLIC

My commission expires: 11-30-01 .

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA CIVIL DIVISION

Kenneth W. Johnson)
)
vs.) No. 98CA003837
)
DC Metropolitan Police Department,)
et al.)
)

FILED
CIVIL ACTION BRANCH
May 27 1998
Superior Court
of The District of Columbia
Washington, D.C.

AFFIDAVIT OF SERVICE

to wit: Washington, DC)
)

I, MARTIN CARROL, JR., having been duly authorized to make service of the Summons, Complaint, Initial Order, Memorandum dated May 18, 1998 direct to Chief Ramsey, General Order Concerning motions Procedure Effective January 1, 1998 and Notice of Hearing in the above entitled case, hereby depose and say:

That my date of birth is 01-16-59.

That my place of business is 1827 18th Street, N.W., Washington D.C. 20009-5526.

That at 12:29 pm on May 26, 1998, I served DC Metropolitan Police Department at 300 Indiana Avenue, N.W. Washington, D.C. 20001 by serving Ms. Clark, Subpoena/Warrents Clerk, authorized to accept. Described herein:

SEX- FEMALE
AGE- 35
HEIGHT- 5'10"
HAIR- BLACK
WEIGHT- 145

COLOR- BLACK

I do solemnly declare and affirm under the penalty of perjury that the matters and facts set forth herein are true to the best of my knowledge, information and belief.

"s/MARTIN CARROL, JR."

MARTIN CARROL, JR.
Our File#- 34376-02

SUBSCRIBED and SWORN to before me this 26th day of May, 1998.

"s/Denise L Daldm"

NOTARY PUBLIC

My commission expires: 11-30-01

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA CIVIL DIVISION

KENNETH W. JOHNSON,	:	
Plaintiff	:	Civil Action No. 98-3837
	:	Cal. #2 J. Gardner
v.	:	Next Event Sched. Conf.
	:	8/21/98
"D.C. METROPOLITAN POLICE DEPARTMENT" (SIC)	:	
Defendants	:	

FILED
CIVIL ACTION BRANCH
Jun 22 1998
Superior Court
of The District of Columbia
Washington, D.C.

DEFENDANT DISTRICT OF COLUMBIA'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Pursuant to Superior Court Rule of Civil Procedure 12(b)(6) and 56, defendant District of Columbia moves this Honorable Court to dismiss plaintiff's complaint, or in the alternative, grant summary judgment in defendant's favor. Defendant is entitled to dismissal or summary judgment because: 1) the District of Columbia Metropolitan Police Department is not a sui juris entity; 2) this claim is barred by issue preclusion, collateral estoppel and res judicata; and 3) plaintiff has failed to satisfy D.C. Code Section 12-309.

In further support of this motion, defendant refers this Court to the memorandum of points and authorities attached.

Respectfully Submitted,

John Ferren
Corporation Counsel, D.C.
Martin Grossman
Deputy Corporation Counsel, D.C.
Civil Division
Arabella W. Teal
Chief, General Litigation Section I
By: "s/James A. DeVita"

James A. DeVita #370578
Assistant Corporation Counsel, D.C.
1 Judiciary Square, Room S-86
441 4th Street, N.W., 6th floor
Washington, D.C. 20001
202-727-6295, ext. 3409

Certificate of Services

I hereby certify that a copy of the foregoing Notice of Hearing was mailed, this 19th day of June, 1998, to:

Kenneth W. Johnson
2122 24th Pl. N.W., Unit B
Washington, D.C. 20018

"s/James A. DeVita"

James A. DeVita
AssistantCoporation Counsel, D.C.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA CIVIL DIVISION

KENNETH W. JOHNSON,	:	
Plaintiff	:	Civil Action No. 98-3837
	:	Cal. #2 J. Gardner
v.	:	Next Event Sched. Conf.
	:	8/21/98
"D.C. METROPOLITAN POLICE DEPARTMENT" (SIC)	:	
Defendants	:	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS , OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

PRELIMINARY STATEMENT

On May 21, 1998, plaintiff filed his complain in the above-captioned matter alleging, inter alia, that he was subjected to harassment by the District of Columbia Metropolitan Police Department. On May 22, 1998, plaintiff filed a virtually identical complaint in the case of Johnson v. O'Boyle C.A. 98-3875, in which he also alleged that he was the victim of police harassment. (A copy of the complaint in Johnson v. O'Boyle, C.A. No. 98-3875 is attached hereto as Exhibit # 1). On May 26, 1998, a hearing was held on plaintiff's motion for a temporary restraining order in the O'Boyle case. At that hearing, Judge Zinora Rankin denied plaintiff's motion for a temporary restraining order and dismissed plaintiff's complaint with prejudice.

The only defendant that plaintiff has named in the instant case is the Metropolitan Police Department. Plaintiff has failed to provide Mayor of the District of Columbia with notice of his claim as is required by D.C. Code Section 12-309. (See the affidavit of Tonia Robinson attached hereto as Exhibit #2). Defendant's favor.

As demonstrated below, the District of Columbia is entitled to dismissal and/or summary judgment because: 1) the District of Columbia Metropolitan Police Department is not a sui juris entity; 2) this claim is barred by issue preclusion, collateral estoppel and res judicata; and 3) plaintiff has failed to satisfy D.C. Code Section 12-309.

ARGUMENT

1. *The District of Columbia Metropolitan Police department is not sui juris entity.*

Plaintiff's complaint must be dismissed, or, in the alternative, summary judgment must be entered in favor of defendant because plaintiff has not amed a *sui juris* entity as a defendant. *Hinton v. Metropolitan Police Department*, 726 F. Supp. 875 (D.D.C. 1998). Since the District of Columbia Metropolitan Police Department is only an agency of the District of Columbia government, it is not an entity that can be sued in its own right. Id.

2. *This claim is barred by issue preclusion, collateral estoppel and resjudicata.*

Since the instant complaint is virtually identical to the complaint with was dismissed with prejudice in Johnson v. O'Boyle, C.A. 98-3875, plaintiff's claim in the instant case is barred by the doctrines of issue preclusion, collateral estoppel and *res judicata. Johnson v. Fairfax Village Condo.* IV 641 A.2d 495, 503 (D.C.App. 1994).

3. *Plaintiff has failed to satisfy D.C. Code Section 12-309.*

Plaintiff's common law claims for false arrest and police harassment must be dismissed or summary judgment granted due to plaintiff's failure to provide the District of Columbia with notice of his claim within six months of the date upon which he suffered injury. D.C. Code Section 12-309 (1995 Repl. Volume). District of Columbia Code 12-309 provides:

> "An action may not be maintained against the District of Columbia for unliquidated damages to person or property unless, within six months after the injury or damage was sustained, the claimant , his agent, or attorney has given notice in writing to the Mayor of the District of Columbia of the approximate time time, place, and circumstances of the injury or damage. A report in writing by the Metropolitan Police Department, in regular course of duty, is a sufficient notice under this section."

The purpose of this notice requirement is to ensure that District of Columbia officials are given prompt notice of claims for potentially large sums of money so that they can 1) quickly investigate before evidence became lost or witnesses unavailable; 2) correct hazardous or potentially hazardous conditions and 3) settle meritorious claims. *Gwinn v. District of Columbia*, 434 A.2d 1376, 1379 (D.C. 1981). This notice requirement is mandatory and if there is no timely written notice, plaintiff is precluded from litigating his claim. Id.

In the instant case, plaintiff clearly failed to send a notice letter to the Mayor of the District of Columbia within six months after his May 17, 1997, arrest date as required by D.C. Code Section 12-309. (See the affidavit of Tonia Robinson attached hereto as Exhibit #2). Given plaintiff's failure to submit a letter to the Mayor within the time period required by D.C. Code 12-309, the District is

entitled to dismissal and/or to summary judgment with respect to plaintiff's common law claims for false arrest.

4. *Conclusion*

In conclusion, defendant respectfully request that its motion for dismissal and/or summary judgment be granted for all of the reasons noted above.

Respectfully Submitted,

John Ferren
Corporation Counsel, D.C.
Martin Grossman
Deputy Corporation Counsel, D.C.
Civil Division
Arabella W. Teal
Chief, General Litigation Section I
By: "s/James A. DeVita"

James A. DeVita #370578
Assistant Corporation Counsel, D.C.
1 Judiciary Square, Room S-86
441 4th Street, N.W., 6th floor
Washington, D.C. 20001
202-727-6295, ext. 3409

SUPERIOR COURT OF THE DISTRICT OF
COLUMBIA
CRIMINAL DIVISION

UNITED STATES OF AMERICA	:	
vs	:	M 7630-97
KENNETH W. JOHNSON Defendant.	:	

Washington, D.C.
December 12, 1997

The above-entitled action came on for a hearing before the Honorable RONALD WERTHEIM, Associate Judge, in Courtroom Number 45.

APPEARANCES:

On behalf of the Government:

NEIL MCBRIDE, Esquire
Assistant United States Attorney

On behalf of the Defendant:

ROBERT MANCE, Esquire
Washington, D.C.

Recorder:
Jacqueline Hogue
Official Court Transcriber Telephone: 879-1757

misses the point. I mean, Mr. Johnson is making money at this club. The only evidence that we have is the testimony or documentary evidence in this case is the exhibit, the door sheet, that was introduced by the Government that I asked Mr. Johnson about. On the evening in question 75 people paid five dollars, 101 people paid ten dollars, 350 people paid fifteen dollars. By my math, Your Honor, that's $5, 250 just for those individuals. I don't know if there were more that night but $5,250.

Now, Mr. Johnson said, and if we are to credit his testimony in this respect, well, the band subtracted their costs and then I took half of what was left. Well, on that particular night there were $5, 250 in gate receipts. There was rounded up, $1,500 for the band, which leaves an amount that when defendant shared, Mr. Johnson's share for half of that, what was remaining would have been $2,557 for that night. That was his half that remained after the band expenses were deducted, one night over – a little over $ 2500 which is by my math about $5100 for weekend, which for a year, give or take, is over $250,000. Your Honor, as the –

THE COURT: That's almost as much as lawyers make.

MR. MCBRIDE: Similar, Your Honor, yes. As the Raleigh case said, Your Honor, while a bawdy-house – quote, while a bawdy-house may prove profitable to its operator, its existence scarcely enriches either specific neighborhood in which it is located or the overall community. And I would suggest that that is what happened here. Mr. Johnson may have been doing well by the club, but the ten people who were shot, weren't doing well by the club. The neighbors whose property were trashed, weren't doing well by the club. The young people that came to this club for entertainment and otherwise, weren't doing well, it certainly wasn't a good example – good environment for them.

And my last point, Your Honor, and then I will sit down, is Mr. Mance said that this case is unique, that there's no other recorded cases like that. I believe that is true insofar as there – as we have said, very few disorderly houses case prosecutions from this century, most of them have been under the bawdy prong and statute. But the disorderly prong still remains.

Mr. Mance wants to wrong away from the fact that Harris notwithstanding that it's dealing with the statute looks to common law and looked to common-law in considerable depth to see how it should be guided. So while this case may be different, Your Honor, from what happened in 1837, times change and this law, while short in words is crafted in a way that it can move with the time. The Raleigh court said it's a very broad statute. Your Honor, the Government submits that it is broad enough. The disorderly prong of this statute is indeed long and broad enough to apply to an establishment like the Taj Mahal that when taken together there's this synergy of events and incidents, things that have happened that indicate it is a criminal nuisance that is a nuisance it is a place which – a magnet for activity which disrupts the public peace and order, corrupts the public morals. And for all these reasons, Your Honor, the Government asks that you find Mr. Johnson guilty of maintaining a disorderly house at the Taj Mahal.

Thank you.

THE COURT: Thank you, counsel.

It is correct that the specific facts are almost entirely undisputed in this case, and that's very rare for a criminal case in my experience. It is also true that this is a criminal case which requires proof of the essential elements of an offense beyond a reasonable doubt. It also means that mens rhea is an element of guilt. Some kind of mental state that the law finds wrongful that must be found before a convictions can be entered.

I mention that in taking up first the question of the third element set out by *Harris* that the proprietor knows or should know of the acts and does nothing to prevent them. I suppose, taken literally, as the Government suggests, it can't be sufficient that the mere waving of a hand is enough to defeat that requirement. I think it is elaborated a little further later in the *Raleigh* case, which is more recent, although not much. There the Court quotes from an old D.C. case that suggests that the requirement is that the defendant either procured it, that is, the unlawful act to be done or permitted it to be done or did nothing to prevent it. In any event, *Harris* does state the law of the jurisdiction. It is an en banc decision. The instruction 4.95 the Government referred to yesterday, has set forth the elements of operating a bawdy-house not the elements of a disorderly house.

Now, Harris says the Government must prove first that acts take place on the premises that disturb the public or constitute a nuisance per se. And nuisance per se is to find as in the nature of a gambling house or a bawdy-house. The acts that either disturb the public or constitute a nuisance per se must be acts that take place on the premises. And I find that that requires the Court to make a clear distinction between activities that occurred inside the Taj Mahal and Those that occurred out on the street.

It is not and was not during the period in which this offense was allegedly committed the responsibility of Mr. Johnson or of any other private citizen to police the neighborhood of the Taj Mahal Club. It was the responsibility of the Metropolitan Police Department to do that. Their utter failure to perform that responsibility does not transfer the blame to Mr. Johnson. Mr. Johnson had no authority to police that area and would have subjected himself to great risk had he even attempted to do so.

Most of the acts of which the Government complains and certainly those to which neighbors complain were acts that took place outside the premises. Now, what

took place inside the premises? Up to five hundred young people, perhaps as many as three hundred at any one time occupied these premises and listened to music of the type that they happened to enjoy and danced. They were search before they went in. On four occasions when officers entered the club –well, on those four occasions there was only one time that any officer saw illegal activity, and that was the occasion when a juvenile came out of the restroom smoking a marijuana cigarette. Even that activity, the juvenile apparently thought it necessary to go hide in the restroom rather than commit it out openly in the larger room. The undercover officer saw no illegal activity. Detective Haggerty saw no illegal activity. No one saw illegal activity during the four times that the police entered this club other than that one marijuana cigarette.

Now, much is made of the snow. One witness said the snow was worst on a March visit. It was less on the next visit and even lesser on the third visit. What was found when the place was search? A few blunts, six items that were submitted to the DEA for analysis. Two out of the six were found to contain illegal drugs. That's totally Less than four ounces of – I mean, four grams of marijuana and less than one gram of cocaine in a place occupied by up to five hundred young people that was dark and where their activities would be unobserved.

In the Court's view that is a rather petty yield for all the efforts that the Government or the police department put into its efforts to build a case against the Taj Mahal Club. It hardly is enough to say that the club was regularly resorted to for the commission of thee acts. It was regularly resorted to listen to music and to dance. And as a defense has contended there is nothing unlawful about that activity. It's certainly not a nuisance per se even though some people might in their personal opinion find it objectionable.

The Government's argue that the connection to the activities outside is a responsibility of Mr. Johnson because those unlawful activities, the trashing of the neighborhood,

the shootings and so on would not have happened but for the existence of the Club. In the Court's view, such a but for test is contrary to the claimant that every element of an offense be proven beyond a reasonable doubt and that mens rhea is required for conviction of the criminal offense.

It is equally true that this activity outside would not have happened but for the Metropolitan Police Department's neglect of it's duties in this neighbor hood. Ten shootings in ten months, numerous cars broken into or windows broken, cars stolen, all the other stuff that we've heard about I've not in four, five – four days of trial heard of a single instance in which a police presence was effected during the hours of operation of this club. The police were much more interested in trying to patch together a case for closing down the club than they were in preventing the activity of which the Government now complains. I think the Government's argument that the activity emanated from the Club is a little bit too metaphysical.

We don't know whether the people who committed these offenses ever were in the club in most instances. And they certainly unlike the cases that the Government relies upon, there is no way of showing, for example, as in the old *Skylark* case that it was a consumption of some substances on the premises that led to the individuals behaving in the way they did after they left. That's also why the dam analogy that the Government makes, doesn't work. There was water that came through that dam and did damage. But there is nothing that came out of this club and did damage. In order to find this Club a nuisance, the Court would have to conclude that it is unlawful to cater to young people and to their taste in music at hours of the night when it is not unlawful in this city for them to be out. That is – would come close to being a cultural discrimination. In any event, the Court believes that it erred in denying the defense's motion for judgment of acquittal at the end of the government's case and it grants that motion at this time.

Parties mat be excused.

I wish there were a way you could appeal because it's a close question, Mr. McBride, on the law and it would be interesting to see what the Court of Appeals does with it. I will state that it's my view that the law requires an acquittal and had the issue been framed in such a way that it would have permitted an appeal, I would have been glad to see it go upstairs. And I should add, also that it was well tried by counsel for both sides.

MR. MCBRIDE: Thank you, Your Honor.

THE COURT: We will recess now. Don't forget to get your exhibits back. Thank you, everyone. Have a nice Christmas.

(Thereupon, the proceedings were concluded.)

CERTIFICATE OF TRANSCRIBER

I, Jacqueline Hogue, an Official Court Transcriber for the Superior Court of the District of Columbia, do hereby certify that in my official capacity I prepared from electronic recordings the proceedings had and testimony adduced in the matter of UNITED STATES OF AMERICA versus KENNETH JOHNSON, Docket Number: M-7630-97, in said Court, on the 12th day of December, 1997.

I further certify that the foregoing 52 pages were transcribed to the best of my ability from said recordings.

In witness whereof, I have subscribed my name this the 27th day of November, 2002.

"s/J. Hogue"

Official Court Transcriber
RECEIVED
2002 Nov 27 P 2:12
CENTRAL RECORDING &
RECORDPRODUCTION
OFFICE

SUPERIOR COURT OF THE DISTRICT OF
COLUMBIA CIVIL DIVISION

Kenneth W. Johnson
2122 24th Place Unit B NE Washington DC 20018
Plaintiff

CAL 11
v. Civil Action No. 0003875-98

James O'Boyle
1805 Bladensburg Rd NE Washington DC 20002
Defendants

FILED
CIVIL ACTION BRANCH
May 22 1998
Superior Court
of The District of Columbia
Washington, D.C.

COMPLAINT

1. Jurisdiction of this Court is founded on D.C. Code Annotated, 1973 edition, as amended, Sec. 11-921.

This is a request for equitable relief, I am requesting that the Court issue a temporary restraing order against one MPD Sergeant James O'Boyle of 1805 Bladensburg Rd NE Washington DC 20002 as he has made threats to close down a Lawful business Operating Lawfully under the rules and regulations of the District of Columbia having all necessary Licenses & Permits He has no lawful reason to do this See Attached Paper Work for Complaint.

Wherefore, Plaintiff demands judgment against Defendant in the sum of _____ with interest and costs.

301 497-4428

Phone

DISTRICT OF COLUMBIA, SS

Kenneth W Johnson, being first duly sworn on oath deposes and says that the forgoing is a just and true statement of the amount owing by defendant to the

plaintiff, exclusive of all set-offs and just grounds of defense.

"s/Kenneth W Johnson"

(Plaintiff — Agent)

Subscribed and sworn to before me this 22st day of May 1998

"s/Debra A. Cheek"

(Notary Public/Deputy Clerk)

Debra A. Cheek
Notary Public
District of Columbia
My Commission Expires
August 14, 2001

K.W.J. ENTERPRISES, Inc.
2122 24th Place NE
Washington, DC 20018

May 18, 1998

Dear Chief Ramsey,

This is a formal complaint of misconduct by Police Officers and Officials working on your Department. I would first like to inform you that a 5th District Officer with the last name Rodrigez, I believe if this is not his correct name I would recognize him on sight. This officer attempted on numerous occasions to extort money from me by threating to close down my nightclub, if I did not comply with his demands. Secondly, my nightclub has been frequented a numerous amount of times by an MPD Sgt. His name is Boyle or Doyle, again if I have it wrong I

would recognize him on sight. This sergeant along with some officers have been harassing myself, club employees, and other people, and have in several instances created a malicious interference to my business and that of other businesses involved. There are several companies who make money from these events taking place and there employees as well as me and my employees, adding up to lots of people job's are being affected as well as companies income. Note: in all the years that I have been in business there has only been to date one arrest of any customer of mine which was in the bathroom. I have done everything I could think of to combat any illegal activity. I have wrote the Chief of Police Office requesting them to allow me to have off duty police. I have submitted names of police officers, Lieutenenants, Sergeants, who want to work for me in there spare time. I have purchase $2,400.00 in insurance to cover the DC Metropolitan Police Department against lawsuits as they require to hire there police. I have hired armed SPO companies, I have hired Club Security Personnel. I have posted flyers at Police Stations to hire off duty police and I have personally encouraged police officers countless times to do there jobs and arrest any person they see in or about my club doing anything illegal. On one occasion for example, this past Friday, which was May 15, 1998, the Sergeant Boyle came into my nightclub ordered me out of my ticket booth as I monitored the band's cashier collecting money, of which ½ is paid to me. He then told me that he smelled marijuana in the air in my club. I told him then he needs to arrest anybody he see with any drug or doing anything illegal, after all he is a police officer and has that responsibility. He states to me that if he smells it again he is going to throw my customers into the street, keep in mind we're talking about hundreds and hundreds of people at one time and shut my club down causing thousands and thousands of dollars to be lost at one time that evening alone, not to mention the long term damage it will cause in these people not returning to my

business to patronize it, were talking liquid damages in the hundreds of thousands of dollars and even millions if sustained long enough. Also, out of all these people and the Sgt. Boyle and his officers probing throughout my nightclub on every visit they did not lock up not one person, there are as many as 300 people in my place at one time and through the course of a night there can be as many as 500 hundred coming in and out. To spite my efforts, I have been harassed and my business maliciously interfered with, band members, myself, customers have been forced to give there names to the same people over and over again. This Sgt. Boyle has made a habit of threating me even though he himself has not caught anyone doing anything that he can arrest then for, I don't have a gun or a badge or a police radio, nor do I have his authority to handcuff an arrest people. I cannot take any more threats from this man nor can I allow people jobs to be destroyed because of this Sergeant and other officers. This Sergeant has me terrified to leave my business at 3:00am or 4:00am when it closes, given the history of this and other experiences. I am concerned that in an act of retaliation this man might try to plant some drugs on me or at my business. I should not have to live with these fears. I have a business that is not only legal but is licensed by the DC Government and I have all of the Licenses and Occupancy permits needed to Lawfully operate my business. My right to do so is being breached by your employees, please do something about it before more damage is caused.

"s/Kenneth W Johnson"

Kenneth W. Johnson
CEO/President

DC R RCP Rules, Introductory Note

Superior Court Rules – Civil (SCR-Civil) Rules, Introductory Note

WEST'S DISTRICT OF COLUMBIA RULES OF COURT SUPERIOR COURT RULES OF CIVIL PROCEDURE

Copr. © 2006 Thomson/West.

Current with amendments received through 7/1/2006

INTRODUCTORY NOTE TO THE SUPERIOR COURT RULES OF CIVIL PROCEDUE

"One of the primary objectives in drafting and adoption of the following Superior Court Rules of Civil Procedure has been to provide an integral and convenient rules structure modeled closely on that of the Federal Rules of Civil Procedure. Thus, the practitioner should understand that these Civil Rules are of three kinds:

(1) Rules 1-86 hereof are derived directly from the correspondingly numbered Federal Rules and are in many cases identical thereto."

DC R RCP Rule 60

Superior Court Rules – Civil (SCR-Civil) Rule 60

WEST'S DISTRICT OF COLUMBIA RULES OF COURT SUPERIOR COURT RULES OF CIVIL PROCEDURE VII. JUDGMENT

Copr. © 2006 Thomson/West.
Current with amendments received through 7/1/2006

RULE 60. RELIEF FROM JUDGMENT OR ORDER

"(b) Mistakes, Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party of a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1)mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. **This Rule does not limit the**

power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court." Writs of coram nobis, coram nobis and audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these Rules or by an independent action.

Comment

Identical to Federal Rule of Civil Procedure 60 except for deletion from section (b) of the inapplicable reference to 28 U.S.C. § 1655 dealing with lien actions in the United States District Courts."

FRCP

Federal Rules of Civil Procedure Rule 60

United States Code Annotated Currentness
Federal Rules of Civil Procedure . for the United States District Courts (Refs & Annos)
VII. Judgment
—Rule 60. Relief From Judgment or Order

"(b) Mistakes, Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party of a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1)mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. **This Rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order,**

or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, **or to set aside a judgment for fraud upon the court.**" Writs of coram nobis, coram nobis and audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these Rules or by an independent action.

NOTE: COPIES OF THE RULES ARE AVAILABLE AT:

http://web2.westlaw.com/signon/default.wl?bhcp=1&fn=%5Ftop&newdoor=true&rs=WLW6%2E11&vr=2%2E0

arch – 1 Result – No terms specified
Lexis.com/research/retrieve?_m=473c996c08716a5d23...

Source: Legal > Federal Legal – U.S. > United States Code Service (USCS) Materials > United States Code Service – Titles 1 through 50

TOC: United States Code Service – Titles 1 through 50 > TITLE 42. THE PUBLIC HEALTH AND WELFARE > CHAPTER 21. CIVIL RIGHTS > GENERALLY > § 1983. Civil action for deprivation of rights (Part 1 of 8)

42 USCS § 1983

UNITED STATES CODE SERVICE
Copyright © 2005 Matthew Bender & Company, Inc.,
One of the LEXIS Publishing (TM) companies
All rights reserved

***CURRENT THROUGH P.L. 109-2, APPROVED 2/18/05

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21. CIVIL RIGHTS
GENERALLY

◆ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

42 USCS § 1983 (2005)

THE CASE NOTES SEGMENT OF THIS DOCUMENT HAS BEEN SPLIT INTO 8 DOCUMENTS. THIS IS PART 1. USE THE BROWSE FEATURE TO REVIEW THE OTHER PART(S).

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

HISTORY:

(R.S. § 1979; Dec. 29, 1979, P.L. 96-170, § 1, 93 Stat. 1284; Oct. 19, 1996, P.L. 104-317, Title III, § 309(c), 110 Stat. 3853.)

HISTORY; ANCILIARY LAWS AND DIRECTIVES

Explanatory notes:

This section formerly appeared as 8 USC § 43.

R.S. § 1979 was derived from Act April 20, 1871, ch 22, § 1, 17 Stat. 13.

Amendments:

1979. Act Dec. 29, 1979 inserted "or the District of Columbia" and "For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.".

1996. Act Oct. 19, 1996 inserted", except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.".

USCA CONST Amend. XIV-Full Text
U.S.C.A. Const. Amend. XIV-Full Text
Constitution of the United States
Annotated
Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement (Refs & Annos)
—Amendment XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

http://web2.westlaw.com/signon/default.wl?bhcp=1&fn=%5Ftop&newdoor=true&rs=WLW6%2E11&vr=2%2E0

DC CODE s 12-309

DC ST § 12-309

Formerly cited as DC ST 1981 § 12-309

District of Columbia Official Code 2001 Edition
Currentness
Division II. Judiciary and Judicial Procedure
Title 12. Right to Remedy. (refs & Annos)
Chapter 3. Limitation of Actions.
—§ 12-309. Actions against District of Columbia for unliquidated damages; time for notice.

An action may not be maintained against the District of Columbia for unliquidated damages to person or property unless, within six months after injury or damage was sustained, the claimant, his agent, or attorney has given notice in writing to the Mayor of the District of Columbia of the approximate time, place, cause, and circumstances of the injury or damage. A report in writing by the Metropolitan Police Department, in regular course of duty, is sufficient notice under this section.

CREDIT(S)

(Dec. 23, 1963, 77 Stat. 511, Pub. L. 88-241, § 1; July 29, 1970, 84 Stat. 551, Pub. L. 91-358, title I, § 141(2); Apr. 30, 1988, D.C. Law 7-104, § 2 (b), 35 DCR 147.)

HISTORY AND STATUTORY NOTES
Prior Codifications
1981 Ed., § 12-309
1973 Ed., § 12-309
http://web2.westlaw.com/signon/default.wl?bhcp=1&fn=%5Ftop&newdoor=true&rs=WLW6%2E11&vr=2%2E0

HAZEL-ATLAS GLASS CO. v. HARTFORD-EMPIRE CO.

No. 398

SUPREME COURT OF THE UNITED STATES

322 U.S. 238; 64 S. Ct. 997; 88 L. Ed. 1250; 1944 U.S. LEXIS 1200; 61 U.S.P.Q. (BNA) 241

February 9, 10, 1944, Argued
May 15, 1944, Decided

PRIOR HISTORY:

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

CERTIORARI, 320 U.S. 732, to review an order of the Circuit Court of Appeals denying relief in a bill of review proceeding commenced in that court.

DISPOSITION: 137 F.2d 764, reversed.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner challenged a decision of the United States Circuit Court of Appeals for the Third Circuit that entered judgment in favor of respondent when the court found that the fraud was not newly discovered and that the court lacked the power to set aside the lower court's decree because of the expiration of the term during which the previous decision had been rendered.

OVERVIEW: Petitioner commenced suit in the appellate court by filing a petition for leave to file a bill of review in the district court to set aside a judgment entered by the district court nine years prior pursuant to the appellate court's mandate. Petitioner contended that the appellate court's judgment had been obtained by fraud; it supported the charge with affidavits and exhibits. The action was spurred on by respondent's allegations that petitioner was infringing upon its patent. Certain issues were not made known to petitioner until nine years later, when it decided to institute the present suit. The appellate court held that the fraud was not newly discovered and that it lacked the power to set aside the district court's decree because of the expiration of the term during which the previous decision had been rendered. The United States Supreme Court granted certiorari to review the appellate court's decision, and it reversed the appellate court's decision and held that the appellate court had the power to set aside the judgment and remand the issue to the lower court because every element of the fraud demanded the exercise of the power to set aside fraudulently begotten judgments.

OUTCOME: The United States Supreme Court reversed the lower court's decision when the court found that, under certain circumstances, one of which was after discovered fraud, relief would be granted against judgments regardless of the term of their entry. The Court held that the appellate court had both the duty and the power to vacate its own judgment and to give the trial court appropriate directions.

CORE TERMS: patent, decree, investigator, infringement, expiration, equitable, leave to file, practiced, glass, interviewed, diligence, infringed, procured, expired, settlement, authorship, feeding, gob, original jurisdiction, preparation, extrinsic, spurious, perjury, denying relief, first instance, perpetrated, wrongdoer, interview, modify, vacate

Lexis(R) Headnotes ♦Hide Headnotes

Civil Procedure > Judgments > Entry of Judgments > General Overview
Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend

HN1:
Federal courts, both trial and appellate, long ago established the general rule that they would not alter or set aside their judgments after the expiration of the term at which the judgments were finally entered.

Civil Procedure > Judgments > Relief From Judgment > Excusable Neglect & Mistakes > General Overview
Civil Procedure > Judgments > Relief From Judgment > Fraud

HN2:
Under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry.

Civil Procedure > Judgments > Relief From Judgment > Fraud
Civil Procedure > Judgments > Relief From Judgment > Independent Actions

HN3:
Equitable relief against fraudulent judgments is not of statutory creation. It is a judicially devised remedy fashioned to relieve hardships which, from time to time, arise from a hard and fast adherence to another court-made rule, the general rule that judgments should not be disturbed after the term of their entry has expired.

Patent Law > Remedies > Bad Faith Enforcement

HN4:
To grant full protection to the public against a patent obtained by fraud, that patent must be vacated.

LAWYERS' EDITION HEADNOTES:

[***HN1]

JUDGMENT, §303
alteration or setting aside after term. –

Headnote: [1]
As a general rule federal courts, both trial and appellate, will not alter or set aside their judgments after the expiration of the term at which the judgments were finally entered.

[***HN2]

EQUITY, §47
relief after term from judgment procured by fraud. --

Headnote: [2]
A court of equity may grant relief against a judgment because of after-discovered fraud, regardless of the term of its entry, but such power should be cautiously exercised.

[***HN3]

EQUITY, §47

JUDGMENT, §303
relief against adjudication of infringement of patent -- effect of expiration of term. –

Headnote: [3]
Equity will set aside a decree in a patent infringement suit that the patent is valid and infringed where both the court and the Patent Office were influenced by fraudulent misrepresentations that the patented device was an advance in the art and where, although the terms of court at which such decree was mandated by a circuit court of appeals and entered by a district court has expired, no equities have intervened through transfer of the fraudulently procured patent or judgment to an innocent purchaser.

[***HN4]

EQUITY, §48
relief against judgment -- lack of diligence. –

Headnote: [4]
Because of the public interest involved, equitable relief against a judgment obtained by fraud in a patent infringement suit will not be denied because the party seeking it has not exercised the highest degree of diligence in uncovering the fraud.

[***HN5]

ESTOPPEL, §65
by own wrong -- fraud. –

Headnote: [5]
Where the plaintiff in a patent infringement suit on appeal from a district court's decision that there had been no infringement, urged upon the attention of the circuit court of appeals a trade magazine article, representing the device in question as an advance in the art, purporting to have been written by a disinterested third person, but in fact prepared by plaintiff, and was successful in obtaining a determination that the patent was valid and infringed,

plaintiff is in no position to dispute the effectiveness of the article in bringing about the decision and may not be permitted to escape the consequence of the deceptive attribution of authorship to a third person on the ground that what the article stated was true.

[***HN6]

REVIEW, §10
bill of -- power of Circuit Court of Appeals to relieve against own decision obtained by fraud. –

Headnote: [6]
A circuit court of appeals has both the duty and the power to relieve against a decree entered in a district court pursuant to its mandate, upon a bill of review after the expiration of the term, for fraud practiced upon it, and is not bound to remit the complainant to the district court for relief.

[***HN7]

EQUITY, §47
relief against fraudulent judgment -- nature of remedy. –

Headnote: [7]
Equitable relief against fraudulent judgments is not of statutory creation, but is a judicially devised remedy fashioned to relieve hardships which from time to time arise from a hard and fast adherence to the court-made rule that judgments should not be disturbed after the term of their entry has expired.

[***HN8]

REVIEW, §15

application to appellate court for leave to file bill -- necessity. –

Headnote: [8]
Where a judgment, the setting aside of which is sought by bill of review, was entered upon the mandate of an appellate court, permission to file the bill must be sought in the appellate court upon appropriate averments supported by affidavits or other acceptable evidence; and such court may, in the exercise of a proper discretion, reject the petition, in which case the bill of review cannot be filed in the lower court.

[***HN9]

DISMISSAL AND DISCONTINUANCE, §17
involuntary -- suit for infringement of patent. –

Headnote: [9]
Fraud in obtaining a patent for an invention, and in representations to the court bearing on the question of its validity, requires a complete denial of relief to the patentee against a claimed infringement.

[***HN10]

PATENTS, §361
vacation -- who may sue. –

Headnote: [10]
Vacation of a patent for an invention because of fraud in obtaining it can only be accomplished in a direct proceeding brought by the Government, and may not be decreed in a suit for its infringement.

SYLLABUS: Upon appeal from a judgment of the District Court denying relief in a suit by Hartford against Hazel for

infringement of a patent, the Circuit Court of Appeals in 1932 held Hartford's patent valid and infringed, and upon its mandate the District Court entered judgment accordingly. In 1941, Hazel commenced in the Circuit Court of Appeals this proceeding, wherein it conclusively appeared that Hartford, through publication of an article purporting to have been written by a disinterested person, had perpetrated a fraud on the Patent Office in obtaining the patent and on the Circuit Court of Appeals itself in the infringement suit. Upon review here of an order of the Circuit Court of Appeals denying relief, *held*:

1. Upon the record, the Circuit Court of Appeals had the power and the duty to vacate its 1932 judgment and to give the District Court appropriate directions. P. 247.

(a) Even if Hazel failed to exercise due diligence to uncover the fraud, relief may not be denied on that ground alone, since public interests are involved. P. 246.

(b) In the circumstances, Hartford may not be heard to dispute the effectiveness nor to assert the truth of the article. P. 247.

2. The Circuit Court of Appeals is directed to set aside its 1932 judgment, recall its 1932 mandate, dismiss Hartford's appeal, and to issue a mandate to the District Court directing it to set aside its judgment entered pursuant to the 1932 mandate, to reinstate its original judgment denying relief to Hartford, and to take such additional action as may be necessary and appropriate. P. 250.

COUNSEL: Mr. Stephen H. Philbin, with whom Mr. Henry R. Ashton was on the brief, for petitioner.

Mr. Francis W. Cole, with whom Messrs. Walter J. Blenko,

Edgar J. Goodrich, and James M. Carlisle were on the brief, for respondent.

Solicitor General Fahy, Assistant Attorney General Shea, and Messrs. Robert L. Stern and Melvin Richter filed a brief on behalf of the United States, as amicus curiae, urging reversal.

JUDGES: Stone, Roberts, Blacks, Reed, Frankfurter, Douglas, Murphy, Jackson, Rutledge

OPINION BY: BLACK

OPINION: [*239] [**998] [***1252] MR. JUSTICE BLACK delivered the opinion of the Court.

This case involves the power of a Circuit Court of Appeals, upon proof that fraud was perpetrated on it by a successful litigant, to vacate its own judgment entered at a prior term and direct vacation of a District Court's decree entered pursuant to the Circuit Court of Appeals' mandate.

Hazel-Atlas commenced the present suit in November, 1941, by filing in the Third Circuit Court of Appeals a petition for leave to file a bill of review in the District Court to set aside a judgment entered by that Court against Hazel in 1932 pursuant to the Third Circuit Court of Appeals' mandate. Hazel contended that the Circuit Court of Appeals' judgment had been obtained by fraud and supported this charge with affidavits and exhibits. Hartford-Empire, in whose favor the challenged judgment had been entered, did not question the appellate court's power to consider the petition, but filed counter affidavits and exhibits. After a hearing the Circuit Court concluded that since the alleged fraud had been practiced on it rather than the District Court it would pass on the [*240] issues of

fraud itself instead of sending the case to the District Court. An order was thereupon entered denying the petition as framed but granting Hazel leave to amend the prayer of the petition to ask that the Circuit Court itself hear and determine the issue of fraud. Hazel accordingly amended, praying that the 1932 judgments against it be vacated and for such other relief as might be just. Hartford then replied and filed additional exhibits and affidavits. The following facts were shown by the record without dispute.

In 1926 Hartford had pending an application for a patent on a machine which utilized a method of pouring glass into molds known as "gob feeding." The application, according to the Circuit Court, "was confronted with apparently insurmountable Patent Office opposition." To help along the application, certain officials and attorneys of Hartford determined to have published in a trade journal an article [**999] signed by an ostensibly disinterested expert which would describe the "gob feeding" device as a remarkable advance in the art of fashioning glass by machine. Accordingly these officials prepared an article entitled "Introduction of Automatic Glass Working [***1253] Machinery; How Received by Organized Labor," which referred to "gob feeding" as one of the two "revolutionary devices" with which workmen skilled in bottle-blowing had been confronted since they had organized. After unsuccessfully attempting to persuade the President of the Bottle Blowers' Association to sign this article, the Hartford officials, together with other persons called to their aid, procured the signature of one William P. Clarke, widely known as National President of the Flint Glass Workers' Union. Subsequently, in July 1926, the article was published in the National Glass Budget, and in October 1926 it was introduced as part of the record in support of the pending application in the Patent Office. [*241] January 3, 1928, the Patent Office granted the application as Patent No. 1,655,391.

On June 6, 1928, Hartford brought suit in the District Court for the Western District of Pennsylvania charging that Hazel was infringing this "gob feeding" patent, and praying for an injunction against further infringement and for an accounting for profits and damages. Without referring to the Clarke article, which was in the record only as part of the "file-wrapper" history, and which apparently was not then emphasized by counsel, the District Court dismissed the bill on the ground that no infringement had been proved. 39 F.2d 111. Hartford appealed. In their brief filed with the Circuit Court of Appeals, the attorneys for Hartford, one of whom had played a part in getting the spurious article prepared for publication, directed the Court's attention to "The article by Mr. William Clarke, former President of the Glass Workers' Union." The reference was not without effect. Quoting copiously from the article to show that "labor organizations of practical workmen recognized" the "new and differentiating elements" of the "gob feeding" patent owned by Hartford, the Circuit Court on May 5, 1932, held the patent valid and infringed, reversed the District Court's judgment, and directed that court to enter a decree accordingly. 59 F.2d 399, 403, 404.

At the time of the trial in the District Court in 1929, where the article seemingly played no important part, the attorneys of Hazel received information that both Clarke and one of Hartford's lawyers had several years previously admitted that the Hartford lawyer was the true author of the spurious publication. Hazel's attorneys did not at that time attempt to verify the truth of the hearsay story of the article's authorship, but relied upon other defenses which proved successful. After the opinion of the Circuit Court came down on May 5, 1932, quoting the spurious [*242] article and reversing the decree of the District Court, Hazel hired investigators for the purpose of verifying the hearsay

by admissible evidence. One of these investigators interviewed Clarke in Toledo, Ohio, on May 13 and again on May 24. In each interview Clarke insisted that he wrote the article and would so swear if summoned. In the second interview the investigator asked Clarke to sign a statement telling in detail how the article was prepared, and further asked to see Clarke's files. Clarke replied that he would not "stultify" himself by signing any "statement or affidavit"; and that he would show the records to no one unless compelled by a subpoena. At the same time, he reinforced his claim of authorship by asserting that he had spent seven weeks in preparing the article.

But unknown to Hazel's investigator, a representative of Hartford, secretly informed of the investigator's view that Hazel's only chance of reopening the case "was to get an affidavit from someone, to the effect that this article was written" by Hartford's attorney, also had traveled to Toledo. Hartford's representative first went to Toledo and talked to Clarke on May 10, three days before Hazel's investigator first interviewed Clarke; and he returned [***1254] to Toledo again on May 22 for a five-day stay. Thus at the time of the investigator's second interview with Clarke on May 24, representatives of both companies were in touch with Clarke in Toledo. But though Hartford's representative knew the investigator was there, the latter was unaware of the presence of the [**1000] Hartford representative. On May 24, Hazel's investigator reported failure; the same day, Hartford's man reported "very successful results." Four days later, on May 28, Hartford's representative reported his "success" more fully. Clarke, he said, had been of "great assistance" and Hartford was in a "most satisfactory position"; it did not "seem wise to distribute copies of all the papers" the representative then had or [*243] to "go into much detail in correspondence"; and Hartford was "quite indebted to Mr. Clarke" who "might easily have caused us a lot of trouble. This should not be forgotten. . . ." Among

the "papers" which the representative had procured from Clarke was an affidavit signed by Clarke stating that he, Clarke, had "signed the article and released it for publication." The affidavit was dated May 24 -- the very day that Clarke had told Hazel's investigator he would not "stultify" himself by signing any affidavit and would produce his papers for no one except upon subpoena.

Shortly afterward Hazel capitulated. It paid Hartford $ 1,000,000 and entered into certain licensing agreements. The day following the settlement, Hartford's representative traveled back to Toledo and talked to Clarke. At this meeting Clarke asked for $ 10,000. Hartford's representative told him that he wanted too much money and that Hartford would communicate with him further. A few days later the representative paid Clarke $ 500 in cash; and about a month later delivered to Clarke, at some place in Pittsburgh which he has sworn he cannot remember, an additional $ 7,500 in cash. The reason given for paying these sums was that Hartford felt a certain moral obligation to do so, although Hartford's affidavits deny any prior agreement to pay Clarke for his services in connection with the article.

Indisputable proof of the foregoing facts was, for the first time, fully brought to light in 1941 by correspondence files, expense accounts and testimony introduced at the trial of the *United States* v. *Hartford-Empire Company et al.*, 46 F.Supp. 541, an anti-trust prosecution begun December 11, 1939. On the basis of the disclosures at this trial Hazel commenced the present suit.

Upon consideration of what it properly termed this "sordid story," the Circuit Court, one Judge dissenting, held, first, that the fraud was not newly discovered; second, [*244] that the spurious publication, though quoted in the 1932 opinion, was not the primary basis of the 1932

decision; and third, that in any event it lacked the power to set aside the decree of the District Court because of the expiration of the term during which the 1932 decision had been rendered. Accordingly the Court refused to grant the relief prayed by Hazel.

[***HR1] [1]
[***HR2] [2]
HN1⇧ Federal courts, both trial and appellate, long ago established the general rule that they would not alter or set aside their judgments after the expiration of the term at which the judgments were finally entered. *Bronson* v. *Schulten*, 104 U.S. 410. This salutary general rule springs from the belief that in most instances society is best served by putting an end to litigation after a case has been tried and judgment entered. This has not meant, however, that a judgment finally entered has ever been regarded as completely immune from impeachment after the term. From the beginning there has existed alongside the term rule a rule of equity to the effect that HN2⇧ under certain circumstances, one of which is after-discovered fraud, relief will [***1255] be granted against judgments regardless of the term of their entry. *Marine Insurance Co.* v. *Hodgson*, 7 Cranch 332; *Marshall* v. *Holmes*, 141 U.S. 589. This equity rule, which was firmly established in English practice long before the foundation of our Republic, the courts have developed and fashioned to fulfill a universally recognized need for correcting injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the term rule. Out of deference to the deep-rooted policy in favor of the repose of judgments entered during past terms, courts of equity have been cautious in exercising their power over such judgments. *United States* v. *Throckmorton*, 98 U.S. 61. But where the occasion has demanded, where enforcement of the judgment is "manifestly [*245] unconscionable," *Pickford* v. *Talbott*, 225 U.S. 651, 657,

they have wielded the power [**1001] without hesitation. n1 Litigants who have sought to invoke this equity power customarily have done so by bills of review or bills in the nature of bills of review, or by original proceedings to enjoin enforcement of a judgment. n2 And in cases where courts have exercised the power, the relief granted has taken several forms: setting aside the judgment to permit a new trial, altering the terms of the judgment, or restraining the beneficiaries of the judgment from taking any benefit whatever from it. n3 But whatever form the relief has taken in particular cases, the net result in every case has been the same: where the situation has required, the court has, in some manner, devitalized the judgment even though the term at which it was entered had long since passed away.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 See, e. g., *Art Metal Works* v. *Abraham & Strauss*, 107 F.2d 940 and 944; *Publicker* v. *Shallcross*, 106 F.2d 949; *Chicago, R. I. & P. Ry. Co.* v. *Callicotte*, 267 F. 799; *Pickens* v. *Merriam*, 242 F. 363; *Lehman* v. *Graham*, 135 F. 39; *Bolden* v. *Sloss-Sheffield Steel & Iron Co.*, 215 Ala. 334, 110 So. 574, 49 A. L. R. 1206. For a collection of early cases see Note (1880) 20 Am. Dec. 160.

n2 See *Whiting* v. *Bank of the United States*, 13 Pet. 6, 13; *Dexter* v. *Arnold*, 5 Mason 303, 308-315. See, also, generally, 3 Ohlinger's Federal Practice pp. 814-818; 3 Freeman on Judgments (5th ed.) § 1191; Note (1880) 20 Am. Dec. 160, *supra*.

n3 See 3 Freeman on Judgments (5th ed.) §§ 1178, 1779.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[***HR3] [3]
Every element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments. This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury. Here, even if we consider nothing but Hartford's sworn admissions, we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals. [*246] Cf. *Marshall* v. *Holmes, supra.* Proof of the scheme, and of its complete success up to date, is conclusive. Cf. *United States* v. *Throckmorton, supra.* And no equities have intervened through transfer of the fraudulently procured patent or judgment to an innocent purchaser. Cf. *Ibid.; Hopkins* v. *Hebard*, 235 U.S. 287.

[***HR4] [4]
The Circuit Court did not hold that Hartford's fraud fell short of that which prompts equitable intervention, but thought Hazel had not exercised proper diligence in uncovering the fraud and that this should stand in the way of its obtaining relief. We cannot easily understand how, under the admitted facts, Hazel should have been expected to do more than [***1256] it did to uncover the fraud. But even if Hazel did not exercise the highest degree of diligence, Hartford's fraud cannot be condoned for that reason alone. This matter does not concern only private parties. There are issues of great moment to the public in a patent suit. *Mercoid Corporation* v. *Mid-Continent Investment Co.*, 320 U.S. 661; *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U.S. 488. Furthermore, tampering with the administration of justice in the manner indisputably

shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

[***HR5] [5]
The Circuit Court also rested denial of relief upon the conclusion that the Clarke article was not "basic" to the Court's 1932 decision. Whether or not it was the primary basis for that ruling, the article did impress the Court, as [*247] shown by the Court's opinion. Doubtless it is wholly impossible accurately to appraise the influence that the article exerted on the judges. But we do not think the circumstances [**1002] call for such an attempted appraisal. Hartford's officials and lawyers thought the article material. They conceived it in an effort to persuade a hostile Patent Office to grant their patent application, and went to considerable trouble and expense to get it published. Having lost their infringement suit based on the patent in the District Court wherein they did not specifically emphasize the article, they urged the article upon the Circuit Court and prevailed. They are in no position now to dispute its effectiveness. Neither should they now be permitted to escape the consequences of Hartford's deceptive attribution of authorship to Clarke on the ground that what the article stated was true. Truth needs no disguise. The article, even if true, should have stood or fallen under the only title it could honestly have been given -- that of a brief in behalf of Hartford, prepared by Hartford's agents, attorneys, and collaborators.

[***HR6] [6]
We have, then, a case in which undisputed evidence filed with the Circuit Court of Appeals in a bill of review proceeding reveals such fraud on that Court as demands, under settled equitable principles, the interposition of equity to devitalize the 1932 judgment despite the expiration of the term at which that judgment was finally entered. Did the Circuit Court have the power to set aside its own 1932 judgment and to direct the District Court likewise to vacate the 1932 decree which it entered pursuant to the mandate based upon the Circuit Court's judgment? Counsel for Hartford contend not. They concede that the District Court has the power upon proper proof of fraud to set aside its 1932 decree in a bill of review proceeding, but nevertheless deny that the Circuit Court possesses a similar power for the reason that the term during [*248] which its 1932 judgment was entered had expired. The question, then, is not whether relief can be granted, but which court can grant it.

[***HR7] [7]
[***HR8] [8]
HN3⇧ Equitable relief against fraudulent judgments is not of statutory creation. It is a judicially devised remedy fashioned to relieve hardships which, from time to time, arise from a hard and fast adherence to another court-made rule, the general rule that judgments should not be disturbed after the term of their entry has expired. Created to avert the evils of archaic rigidity, this equitable procedure has always been characterized [***1257] by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations. It was this flexibility which enabled courts to meet the problem raised when leave to file a bill of review was sought in a court of original jurisdiction for the

purpose of impeaching a judgment which had been acted upon by an appellate court. Such a judgment, it was said, was not subject to impeachment in such a proceeding because a trial court lacks the power to deviate from the mandate of an appellate court. The solution evolved by the courts is a procedure whereby permission to file the bill is sought in the appellate court. The hearing conducted by the appellate court on the petition, which may be filed many years after the entry of the challenged judgment, is not just a ceremonial gesture. The petition must contain the necessary averments, supported by affidavits or other acceptable evidence; and the appellate court may in the exercise of a proper discretion reject the petition, in which case a bill of review cannot be filed in the lower court. *National Brake Co.* v. *Christensen*, 254 U.S. 425, 430-433.

We think that when this Court, a century ago, approved this practice and held that federal appellate courts have the power to pass upon, and hence to grant or deny, petitions [*249] for bills of review even though the petitions be presented long after the term of the challenged judgment has expired, it settled the procedural question here involved. *Southard* v. *Russell*, 16 How. 547. n4 To reason [**1003] otherwise would be to say that although the Circuit Court has the power to act after the term finally to deny relief, it has not the power to act after the term finally to grant relief. It would, moreover, be to say that even in a case where the alleged fraud was on the Circuit Court itself, the relevant facts as to the fraud were agreed upon by the litigants, and the Circuit Court concluded relief must be granted, that Court nevertheless must send the case to the District Court for decision. Nothing in reason or precedent requires such a cumbersome and dilatory procedure. Indeed the whole history of equitable procedure, with the traditional flexibility which has enabled the courts to grant all the relief against judgments which the equities require, argues against it. We hold, therefore, that the Circuit Court

on the record here presented n5 had [*250] both the duty and the [***1258] power to vacate its own judgment and to give the District Court appropriate directions.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n4 See also *Tyler* v. *Magwire*, 17 Wall. 253, 283: "Repeated decisions of this court have established the rule that a final judgment or decree of this court is conclusive upon the parties, and that it cannot be reexamined at a subsequent term, *except in cases of fraud*, as there is no act of Congress which confers any such authority." (Italics supplied.)

n5 We do not hold, and would not hold, that the material questions of fact raised by the charges of fraud against Hartford could, if in dispute, be finally determined on ex parte affidavits without examination and cross-examination of witnesses. It should again be emphasized that Hartford has never questioned the accuracy of the various documents which indisputably show fraud on the Patent Office and the Circuit Court, and has not claimed, either here or below, that a trial might bring forth evidence to disprove the facts as shown by these documents. And insofar as a trial would serve to bring forth additional evidence showing that Hazel was not diligent in uncovering these facts, we already have pointed out that such evidence would not in this case change the result.

Moreover, we need not decide whether, if the facts relating to the fraud were in dispute and difficult of ascertainment, the Circuit Court here should have held hearings and decided the case or should have sent it to the District Court for decision. Cf. *Art Metal Works* v. *Abraham & Strauss*, *supra*, Note 1.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[***HR9] [9]
The question remains as to what disposition should be made of this case. Hartford's fraud, hidden for years but now admitted, had its genesis in the plan to publish an article for the deliberate purpose of deceiving the Patent Office. The plan was executed, and the article was put to fraudulent use in the Patent Office, contrary to law. U. S. C., Title 35, § 69; *United States* v. *American Bell Telephone Co.*, 128 U.S. 315. From there the trail of fraud continued without break through the District Court and up to the Circuit Court of Appeals. Had the District Court learned of the fraud on the Patent Office at the original infringement trial, it would have been warranted in dismissing Hartford's case. In a patent case where the fraud certainly was not more flagrant than here, this Court said: "Had the corruption of Clutter been disclosed at the trial . . . , the court undoubtedly would have been warranted in holding it sufficient to require dismissal of the cause of action there alleged for the infringement of the Downie patent." *Keystone Driller Co.* v. *Excavator Co.*, 290 U.S. 240, 246; cf. *Morton Salt Co.* v. *G. S. Suppiger Co., supra*, 493, 494. So, also, could the Circuit Court of Appeals have dismissed the appeal had it been aware of Hartford's corrupt activities in suppressing the truth concerning the authorship of the article. The total effect of all this fraud, practiced both on the Patent Office and the courts, calls for nothing less than a complete denial of relief to Hartford for the claimed infringement of the patent thereby procured and enforced.

Since the judgments of 1932 therefore must be vacated, the

case now stands in the same position as though Hartford's corruption had been exposed at the original trial. [*251] In this situation the doctrine of the *Keystone* case, *supra*, requires that Hartford be denied relief.

[***HR10] [10]
HN4⇧ To grant full protection to the public against a patent obtained by fraud, that patent must be vacated. It has previously been decided that such a remedy is not available in infringement proceedings, but can only be accomplished in a direct proceeding brought by the Government. *United States* v. *American Bell Telephone Co., supra.*

[**1004] The judgment is reversed with directions to set aside the 1932 judgment of the Circuit Court of Appeals, recall the 1932 mandate, dismiss Hartford's appeal, and issue mandate to the District Court directing it to set aside its judgment entered pursuant to the Circuit Court of Appeals' mandate, to reinstate its original judgment denying relief to Hartford, and to take such additional action as may be necessary and appropriate.

Reversed.

JOHN DEMJANJUK, Petitioner-Appellant, v. JOSEPH PETROVSKY, et al., Respondents-Appellees. Upon Reconsideration of an DEMJANJUK

No. 85-3435

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

10 F.3d 338; 1993 U.S. App. LEXIS 29694; 27 Fed. R. Serv. 3d (Callaghan) 437

September 3, 1993, Argued
November 17, 1993, Decided
November 17, 1993, Filed

SUBSEQUENT HISTORY: [**1] Rehearing En Banc Denied February 24, 1994, Reported at: 1994 U.S. App. LEXIS 3678.

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of Ohio. District No. 85-01226. Frank J. Battisti, District Judge. Thomas A. Wiseman, Jr., District Judge.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant immigrant appealed a decision from the United States District Court for the Northern District of Ohio, which denied his petition for habeas corpus relief from an extradition warrant. Specifically, defendant argued on appeal that plaintiff had omitted exculpatory evidence tending to show that defendant's identity was wrongfully confused with that of a war criminal.

OVERVIEW: Defendant immigrant was prosecuted in a federal district court for alleged criminal activity that he conducted during World War II. After trial, the district court found him guilty and ordered his extradition to Israel to undergo trial and probable capital punishment if convicted. In response, defendant appealed, arguing that he was entitled to habeas corpus relief because plaintiff engaged in severe misconduct by failing to disclose discovery information that could have incriminated another war criminal. The court appointed a Special Master after defendant's trial to evaluate the weight of the evidence, and to determine whether plaintiff withheld material information. Upon a final determination, the court vacated defendant's extradition order on the grounds that plaintiff's withholding of evidence, regardless of whether it was knowingly accomplished, amounted to a severe fraud on the court. In addition, the Special Master's findings as to the likely culpability of the alternative party sufficed as further evidence that plaintiff's discovery error prejudiced defendant.

OUTCOME: Defendant was granted his motion to vacate an extradition order, where plaintiff engaged in misconduct by not disclosing information that could have possibly led to a conviction of another party. The court held that, although plaintiff's withholding of such information was not proven to be intentional, it still amounted to fraud on the court.

CORE TERMS: guard, camp, ivan, chamber, photograph, denaturalization, prisoner, barrack, extradition, identification, gas chamber, death camp, card, memorandum, extermination, survivor, discovery, prosecutor, train, barbed wire, photo, hair, exculpatory, deposition, clothing, arrived, meter, duty, trained, signature

LexisNexis(R) Headnotes ◆Hide Headnotes

Civil Procedure > Judicial Officers > Masters > General Overview
Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review > General Overview

HN1:
The United States Court of Appeals for the Sixth Circuit is required to accept a Special Master's findings of fact unless clearly erroneous.

Civil Procedure > Discovery > Methods > Requests for Production & Inspection
Criminal Law & Procedure > Discovery & Inspection > Brady Materials

HN2:
It would be error to exclude from the definition of fraud on the court intentional, fraudulent nondisclosure during discovery.

Torts > Negligence > General Overview

HN3:
Recklessness on the part of a party exists when the actor has knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so. An objective standard is applied to him, and he is held to the realization of the aggravated risk, which a reasonable man in his place would have, although he does not himself have it.

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Obstruction of Justice > General Overview
Criminal Law & Procedure > Discovery & Inspection >

Discovery Misconduct
Criminal Law & Procedure > Appeals > Reversible Errors > General Overview

HN4:
Fraud on the court is a somewhat nebulous concept usually discussed in civil cases. No court system can function without safeguards against actions that interfere with its administration of justice. This concern must be balanced against the necessity for finality of court judgments; thus, only actions that actually subvert the judicial process can be the basis for upsetting otherwise settled decrees.

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > General Overview
Governments > Courts > Court Personnel

HN5:
Fraud upon the court should embrace only that species of fraud which does or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication, and relief should be denied in the absence of such conduct.

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > General Overview
Governments > Courts > Court Personnel

HN6:
Cases dealing with fraud on the court often turn on whether the improper actions are those of parties alone, or if the attorneys in the case are involved. As an officer of the court, every attorney has a duty to be completely honest in conducting litigation.

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > General Overview
Governments > Courts > Court Personnel
Legal Ethics > Prosecutorial Conduct

HN7:
While an attorney should represent his client with singular loyalty, that loyalty obviously does not demand that he act dishonestly or fraudulently; on the contrary his loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court. And when he departs from that standard in the conduct of a case he perpetrates fraud upon a court.

Criminal Law & Procedure > Discovery & Inspection > Brady Materials

HN8:
The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

Civil Procedure > Judgments > Relief From Judgment > Fraud
Civil Procedure > Judgments > Relief From Judgment > Independent Actions
Governments > Courts > Authority to Adjudicate

HN9:
See Fed. R. Civ. P. 60(b).

COUNSEL: For JOHN DEMJANJUK, Petitioner - Appellant: Edward Marek, Fed. Public Defender,

BRIEFED, Federal Public Defender's Office, Cleveland, OH. Michael E. Tigar, ARGUED, BRIEFED, University of Texas Law School, Austin, TX.

For JOSEPH PETROVSKY, Respondent - Appellee: Patty Merkamp Stemler, ARGUED, BRIEFED, Department of Justice Criminal Division, Appellate Section, Washington, DC.

JUDGES: Before: MERRITT, Chief Judge; KEITH, Circuit Judge; and LIVELY, Senior Circuit Judge.

OPINION BY: LIVELY

OPINION: [*339] LIVELY, Senior Circuit Judge. The question before the court is whether attorneys in the Office of Special Investigations (OSI), a unit within the Criminal Division of the Department of Justice, engaged in prosecutorial misconduct by failing to disclose to the courts and to the petitioner exculpatory information in their possession during litigation culminating in extradition proceedings, which led to the petitioner's forced departure from the United States and trial on capital charges in the State of Israel. For the reasons stated herein we conclude the OSI did so engage in prosecutorial misconduct that seriously misled the court.

I.

A.

This matter is before the court on its own motion, pursuant to an order entered on June 5, 1992. In the June 5 order we stated that information had come to the attention of the court which required us to determine whether this court's affirmance of the district court's denial of John Demjanjuk's petition for habeas corpus relief from an extradition warrant

was improvident. See Demjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir. 1985), [**2] **cert. denied**, 475 U.S. 1016, 89 L. Ed. 2d 312, 106 S. Ct. 1198 (1986).

The order directed the respondents to address certain questions related to the identification of Demjanjuk as the notorious Ukrainian guard at the Nazi extermination camp near Treblinka, Poland called by Jewish inmates "Ivan the Terrible" (Ivan Grozny). The order also set the matter for oral argument on August 11, 1992. The Department of Justice appeared for the respondents.

Following briefing and oral argument, the court entered an order on August 17, 1992, appointing a Special Master pursuant to **Fed. R. Civ. P.** 53(c). The Special Master was directed to take testimony and prepare a report on the issue of whether failure of government attorneys to disclose exculpatory information in their possession constituted prosecutorial misconduct or fraud upon the court that misled the court into allowing Demjanjuk to be extradited. Pursuant to the government's motion, a clarifying order was entered on August 31, 1992. Copies of the June 5 and August 17 orders are annexed to this opinion as Appendix 1 and Appendix 2, respectively.

B.

The Special Master, United States District Judge Thomas A. Wiseman, Jr. of the Middle District [**3] of Tennessee, conducted extensive hearings over a period of approximately six months and received other evidence by deposition. After closing proceedings following oral arguments on April 30, 1993, Judge Wiseman prepared a comprehensive report (S.M. Report), which he filed with this court on June 30, 1993.

Because the district court's extradition order had been

based primarily on the record of earlier denaturalization proceedings against Demjanjuk, the master included within the scope of his inquiry actions of government attorneys in the 1981 denaturalization case and later deportation proceedings as well as in the extradition case. Chief Judge Frank Battisti conducted both the denaturalization and the extradition proceedings. The district court's opinion in the denaturalization proceedings is reported at 518 F. Supp. 1362 (N.D. Ohio 1981) **aff'd per curiam**, 680 F.2d 32 (6th Cir. 1982), **cert. denied**, 459 U.S. 1036 (1982). The district court's opinions in the extradition proceeding are reported at 612 F. Supp. 544 and 612 F. Supp. 571 (N.D. Ohio 1985). [**4] [*340] Demjanjuk's claims of misconduct consisted of the government's failure to disclose information that pointed to another Ukrainian guard at Treblinka, Ivan Marchenko, as "Ivan the Terrible." Demjanjuk's denaturalization and deportation orders were based on his alleged misrepresentations concerning his wartime whereabouts and activities at the time he applied for entry into the United States as a displaced person and in his application for citizenship. These orders were based primarily, although not exclusively, on Demjanjuk's failure to disclose his alleged wartime activities as "Ivan the Terrible" at Treblinka. The extradition order was based solely upon the district court's finding that Demjanjuk was Ivan the Terrible. n1 This was the charge on which Israel sought his extradition, and on which he was ultimately tried and convicted by an Israeli trial court. As the Supreme Court of Israel stated, "the fact the appellant [Demjanjuk] was a guardsman at the Trawniki unit" and similar background evidence "was not the main matter which was set before the authorities in the United States and before the court in Israel, but it was part of the collection of factual information." (Translation [**5] of the final section of the decision of the Supreme Court of Israel in Demjanjuk's appeal at 21). The "main matter" before the courts in both countries in all the proceedings, as the Supreme Court of

Israel observes, and the records of proceedings in the United States establish, was the "Ivan the Terrible" charge.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 In the extradition proceedings the district court considered evidence that Demjanjuk was trained as a concentration camp guard at a facility in Trawniki, Poland. The government based its claim that Demjanjuk had served at Trawniki, and later at the Sobibor extermination camp, on a passage from a book about the Holocaust, and an identification badge supposedly issued to guards who were trained at Trawniki. The district court concluded that a decision as to the validity of "the Trawniki card" identifying Demjanjuk was not required in order to support extradition. 612 F. Supp. at 553.

- - - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

We directed the parties to file briefs setting forth their views and arguments respecting the Special [**6] Master's report and set the matter for oral argument on September 3, 1993. Following full briefing and extended oral argument the matter was submitted for decision.

II.

The master made findings of fact, largely based on credibility determinations, which absolved the government attorneys of deliberately and intentionally failing to disclose information that they considered exculpatory. Judge Wiseman also found that the various proceedings against Demjanjuk were not affected by political pressures from congressional sources and various Jewish groups in the United States. S.M. Report at 27-28. HN1⇧ We are

required to accept the master's findings of fact unless clearly erroneous. **Fed. R. Civ. P.** 53(e)(2).

A.

The master considered six specific claims by Demjanjuk that acts and omissions of OSI attorneys described therein constituted prosecutorial misconduct or fraud on the court. These claims related to statements of various witnesses and a report of a Polish investigation that had come into OSI's possession. In each case the master found that government attorneys had failed to disclose or produce documents or other materials that should have been subject to disclosure or production [**7] under outstanding discovery requests and **Fed. R. Civ. P.** 26(e). In each instance, however, the master exonerated the government attorneys on one or more of the following findings: either that the attorneys did not believe the materials were within the scope of outstanding discovery requests; that they believed in good faith that the materials did not relate to Demjanjuk; or that a particular attorney then responsible for complying with requests was not aware of the existence of specified materials even though other attorneys who worked on the Demjanjuk cases did know of and had seen the materials.

In making these determinations, the master considered each of the six claims in light of the successive sets of interrogatories filed by Demjanjuk during the denaturalization proceedings. At the time he filed the first set of interrogatories Demjanjuk filed a request for production of documents and stated [*341] that both were to be treated as of a continuing nature. Question 2 of the first set of interrogatories asked whether a statement had been obtained from any person whose name and address had been sought in Question 1. The respondents argued that they had complied fully by providing names [**8] of persons who claimed to have any knowledge of

Demjanjuk's alleged activities at Treblinka as requested in Question 1 of the first set. The master refused to accept the OSI attorneys' arguments, stating:

Thus, the defendant specifically asked for the names of all witnesses to the defendant's alleged actions, and whether statements had been obtained from those people. When read in conjunction with Mr. Demjanjuk's first request for production, he clearly had requested all witness statements.

S.M. Report at 165. Similarly, the master found that the government never supplied the names of several witnesses whose identity was required to be disclosed by Question 1.

Another set of interrogatories asked specifically about foreign government reports concerning activities of Ivan the Terrible at Treblinka. The previously described materials from the Polish investigation of the Treblinka atrocities were in the government's possession in 1979, but were not produced until 1982, after the conclusion of the denaturalization proceedings. This failure was an "oversight," according to one government attorney. S. M. Report at 171. Finally, and most significantly, as early as 1978 or 1979 the government [**9] had information from official sources within the Soviet Union indicating that there were two Ukrainian operators of the gas chambers at Treblinka--Ivan and Nikolai--and that "Ivan Grozny" was a man named Ivan Marchenko, not Ivan Demjanjuk.

B.

The master found some of the respondents' failures "excusable," some "inadvertent," and most to have resulted from the government attorneys' mistaken understanding of the scope of their duty of production under the discovery requests made by Demjanjuk. Judge Wiseman stated:

[A] careful reading of Mr. Demjanjuk's discovery requests demonstrates that he asked for virtually every piece of evidence that is at issue in these proceedings. As demonstrated, the government did not provide the evidence because it believed that it was under no duty to do so. The heart of the discovery problems, therefore, was a tragic misunderstanding.

S.M. Report at 204. Noting that no fewer than eight government attorneys worked on the Demjanjuk denaturalization case, the master blamed the misunderstanding with respect to the duty to disclose and produce materials on "the unstable and fractious character" of the prosecution team. The difficulties resulting from rivalries [**10] between OSI and the United States Attorney's office in Cleveland, and the frequent changes of attorneys assigned to the case were compounded, the master found, by the attitude of the government trial attorneys that "at times bordered on gamesmanship." S.M. Report at 205.

The master found that, in interpreting Demjanjuk's requests and interrogatories so narrowly, the government attorneys were "playing hardball." S.M. Report at 172. Judge Wiseman pointed out that when questions arose as to whether the later of two requests for information from foreign governments was redundant or inconsistent with the first request, the government attorneys had several options. They could have complied with the requests; they could have sought a protective order if they felt the requests were redundant or oppressive; or they could have contacted defense counsel by telephone for a clarification. As the master stated:

Each of these options would have had the advantage of providing the defense either with the requested information, or with notice of the misunderstanding. Although I believe

that the consequences were unintended, the course they took-- silently imposing a limitation on the earlier interrogatory-- [**11] almost certainly misled [defense [*342] counsel] and endangered Mr. Demjanjuk's ability to mount a defense.

S.M. Report at 175.

III.

The Special Master was disturbed by the fact that the government attorneys continued to be less than forthcoming with materials from foreign sources after agreeing at a pretrial hearing in the denaturalization case that the government had superior access to such materials and should make every effort to obtain them and furnish them to the defense.

A.

Undisclosed materials from the former Soviet Union and Poland form the principal basis for Demjanjuk's contention that OSI attorneys engaged in misconduct that amounted to fraud. The Supreme Court of Israel reversed Demjanjuk's conviction as Ivan the Terrible and acquitted him based largely on statements of Ukrainian guards at Treblinka who clearly identified Ivan Marchenko as Ivan the Terrible. The Israeli Supreme Court found that these statements raised a reasonable doubt as to Demjanjuk's guilt even though eighteen Jewish survivors of Treblinka and one German guard there had identified him as "Ivan the Terrible" from photographs made in 1942 and 1951.

The government did not have all of the statements relied [**12] upon by the Israeli Supreme Court in its possession during the various proceedings against

Demjanjuk in this country. Some of the statements came from Russian and Ukrainian sources after the breakup of the Soviet Union. Demjanjuk maintains, however, that during its investigation prior to the denaturalization trial the government did obtain from official sources in the Soviet Union and Poland documents and statements that should have raised doubts about Demjanjuk's identity as Ivan the Terrible, and some of which named Marchenko as the wanted "Ivan." Because the OSI attorneys consistently followed an unjustifiedly narrow view of the scope of their duty to disclose, and compartmentalized their information in a way that resulted in no investigation of apparently contradictory evidence, Demjanjuk and the court were deprived of information and materials that were critical to building the defense.

B.

We briefly describe the claims related to five of these undisclosed documents and groups of documents, indicating with parentheses the date each came into the possession of one or more attorneys at OSI:

1. **The Fedorenko Protocols (1978)**
This evidence consists of statements received [**13] from the former Soviet Union including the statements of two former Treblinka guards, Malagon and Leleko, who discussed the presence of a gas chamber motorist named Marchenko. Both the Leleko and Malagon statements are by Treblinka guards who demonstrate great familiarity with the operations and the operators of the gas chambers of Treblinka. They both name a man other than the accused as the notoriously cruel "Ivan the Terrible" who ran the motors of the gas chambers. Excerpts from the Leleko and Malagon statements are annexed to this opinion as Appendices 3, 4 and 4-A respectively. Also accompanying this evidence was a list of guards transferred out of the

Trawniki, Poland training camp on which Demjanjuk's name did not appear. The survivors identified Ivan the Terrible as one of the Ukrainian operators of the Treblinka gas chambers ("motorist"), who was especially cruel and committed atrocities upon the Jewish victims as he herded them into the lethal chambers.

2. **The Danilchenko Protocols (1979)**
This evidence consists of statements received from the former Soviet Union including a second statement from the former Treblinka guard Malagon who stated that an "Ivan Demedyuk [**14] or Ivan Dem'yanyuk" worked at Treblinka as a cook, that a guard named Marchenko operated the gas chambers, and who stated that the man he knew as "Ivan Demedyuk or Ivan Dem'yanyuk" was not pictured in the photospread shown to him. Jt. App. 178, 179. Danilchenko, a guard at the Sobibor, Poland death [*343] camp, stated that Demjanjuk was a fellow guard at Sobibor and that they were transferred from Sobibor to Flossenburg, Germany together. Respondent's Appendix 221-22. Although these statements are inculpatory to the extent they place Demjanjuk at the Sobibor and Flossenburg concentration camps, Demjanjuk contended that he was entitled to have them produced because they were exculpatory with respect to the Treblinka "Ivan" claims and would permit him to refute the claim that he was at Sobibor and Flossenburg.

3. **The Dorofeev Protocols (1980)**
This evidence received from the former Soviet Union consists of statements of five Soviets who served at the Trawniki, Poland training camp for guards. Only one individual recalled the name Demjanjuk and although he identified two of Demjanjuk's photos in a three-photograph photospread, he qualified his identification by stating that

his recollection [**15] of Demjanjuk was poor. Three of the others stated that transfers between camps were routed through Trawniki which served as a distribution center. Jt. App. 155. Again, this evidence has both inculpatory and exculpatory elements, but Demjanjuk argued that he was entitled to the statements demonstrating that four of the five Trawniki witnesses were unable to identify him and that the fifth was very tentative.

4. "Polish Main Commission" List (1979)

This evidence consists of an article published by the Polish Main Commission, a government body, which partially lists names of known guards at Treblinka. The name Ivan Marchenko appears on the list. Demjanjuk's name does not appear on the list. The Commission conducted an official investigation of the activities carried on at Treblinka in connection with a more extensive investigation of Nazi war crimes in Poland. Jt. App. 502, 556. At the time OSI received this list of more than 70 names containing Marchenko's name, but not that of Demjanjuk, it already had Leleko's statement identifying "Nikolai" and Marchenko as two different people who operated the gas chambers. (Nikolai was identified in documents later received from former [**16] Soviet sources as Nikolai Shalayev, who gave a statement in 1950 that he and Marchenko were the two gas chamber operators. This evidence was admitted by the Israeli Supreme Court.) Demjanjuk contended that any attorney considering the Polish list in combination with the Leleko statement would have realized that information from foreign governments pointed to Marchenko, not Demjanjuk, as Ivan the Terrible and should have produced them in response to Questions 1 and 2.

An OSI attorney, George Parker, who was lead counsel in the denaturalization case prior to his resignation in 1980,

prepared extensive notes describing and commenting on the evidence in that case sometime before the trial. Jt. App. 152, 167. In those notes he stated that Leleko had named "Nickolay" and Marchenko as motorists and that Marchenko had sword-cut women's breasts, one of the atrocities charged against Demjanjuk as Ivan the Terrible. Before the Special Master, Parker testified that he did not make the connection, because Malagon's statement indicated that Nikolai or Nickolay was Marchenko's first name. Thus, the other guard was Ivan, and, he believed, Demjanjuk. Transcript, Nov. 12, 1992, at 80.

5. [**17] **Otto Horn Interview Memoranda (1979)**
This evidence consists of "Reports of Interview" from an OSI investigator, Bernard Dougherty, and a historian, George Garand, written in 1979 contemporaneously with an interview of Otto Horn, a former SS guard at Treblinka, at which Horn identified Demjanjuk as a Treblinka guard. Although Horn identified Demjanjuk in a photospread, the investigator and historian both wrote in separate memoranda that this identification occurred only after Horn noted that Demjanjuk's photo appeared in both of the two photospreads and while Demjanjuk's photo from the first photospread [*344] lay facing up during his examination of the second photospread. Horn later testified that the photo in the first spread was not visible to him when he made the identification from the second.

These memoranda were addressed to Arthur Sinai, Deputy Director of OSI. A routing slip from Sinai directed "Stacey" to make two copies of one of these reports and forward one to Norman Moscowitz. Jt. App. 586. At that time Moscowitz was working with Parker on the Demjanjuk denaturalization case. He became lead counsel following Parker's resignation, and actually tried the case.

[**18]

The statements were not produced to Demjanjuk or disclosed to the district court in the denaturalization proceedings when that court received a videotaped deposition of Horn taken some time after the initial identification from the two photospreads. In the videotaped deposition Horn stated that he did not see the two photospreads at the same time--that the first one was put away out of his sight before he examined the second one. The district court stated that it found "no aberrations in the conduct of these identifications which may be said to detract from the identifications Horn made." 518 F. Supp. at 1372.

Moscowitz testified before the Special Master that he did not read the investigator and historian's reports prior to the denaturalization trial, although he did not deny receiving them. Transcript, Jan. 14, 1993, at 91-93. Demjanjuk claims that the OSI attorneys committed misconduct and fraud on the court in presenting Horn's videotaped identification testimony without producing the reports that detailed a highly suggestive identification procedure. Relevant portions of the Dougherty and Garand reports are annexed to this opinion as Appendices [**19] 5 and 6, respectively.

C.

There is a further consideration with respect to the Fedorenko Protocols. Following the district court's judgment in the denaturalization case, Norman Moscowitz who was then chief trial counsel in that case, wrote a letter

to Demjanjuk's counsel, John Martin, with a copy to the trial judge. Jt. App. 147. In this letter Moscowitz stated that documents had been received from the Soviet Union (the Dorofeev Protocols) just before trial and that OSI, for various reasons, had not disclosed or produced them to Demjanjuk's counsel. The letter characterized these materials as "further incriminatory information and support for the government's case." The letter also stated that Demjanjuk was being advised of the existence of these documents in order to make "the record of discovery complete."

Demjanjuk filed a motion for a mistrial, which the district court treated as a motion for a new trial. The district court held a hearing on the motion on May 4, 1981. Demjanjuk's attorneys argued that the Dorofeev information would have been valuable to the defense, that four of the five former Trawniki guards had failed to identify Demjanjuk while only one had identified [**20] him. Counsel asserted that it would have been important for the defense to contact these men, particularly to learn if they had been issued identification badges like the "Trawniki card" relied upon by the government. The expert witness at the trial who had testified that the card appeared to be authentic had stated that the one exhibited there was the only one he had ever seen, though he was a Holocaust historian.

The government argued that it had no agreement or duty to supplement answers to interrogatories and requests. Even if there was a duty to produce the documents, the government asserted, Demjanjuk was not prejudiced by this oversight. During the government's argument, attorney Moscowitz told the court that he was perfectly willing to give the defense the witness' statements "as everything else." At this time Demjanjuk's counsel only had the letter describing the contents of the statements, not the Dorofeev statements themselves.

Chief Judge Battisti ruled that the government had a duty to provide the names of the five witnesses before or during the trial. He then ordered government counsel to turn [*345] over copies of the statements to the defendant and to the court, and recessed [**21] the hearing until Demjanjuk's counsel and the court had an opportunity to review them. Following the recess, the district court heard further argument and then asked for briefs from the parties before adjourning the hearing. Jt. App. 767. The court ultimately ruled that the Dorofeev materials were cumulative and in fact supported the government's arguments that Demjanjuk had been at Trawniki and that Trawniki was a training center for guards assigned to all of the extermination camps, including Sobibor as well as Treblinka. 518 F. Supp. at 1384-86.

Demjanjuk argues that, given the district court's ruling that the government had a duty to disclose and produce the Dorofeev Protocols, Moscowitz should have realized that the same duty applied to the Fedorenko Protocols, which also came from the Soviet Union. Though Moscowitz represented that his post-trial letter disclosing the existence of the Dorofeev Protocols was written in order to make the record of discovery complete, he still did not disclose or produce the Fedorenko documents, which had been in OSI's possession since 1978.

In his testimony before the Special Master, Moscowitz admitted reading the Fedorenko [**22] documents prior to the denaturalization proceedings. Neither he nor Parker, who also read them, felt that they supplied any help in the Demjanjuk cases. According to the master, these documents disappeared in the winter of 1981 after the denaturalization trial and only resurfaced in 1991 in response to a Freedom of Information Act case by Congressman James Traficant of Ohio. At oral argument before this court, government counsel stated the Fedorenko

documents didn't actually disappear: "They were just put back in the Fedorenko files. They came with the Fedorenko case and when the Demjanjuk case was over, they went back to their Fedorenko file."

It is hard to credit this explanation. The Fedorenko file, particularly the Leleko and Malagon statements, contain significant evidence tending to show that a person other than Demjanjuk was in fact "Ivan the Terrible of Treblinka." The record contains copies of a letter dated October 23, 1978, from the General Counsel to Martin Mendelsohn, chief of litigation in the "Special Litigation Unit" (SLU) of the Department of Justice, predecessor to OSI. Jt. App. 215-17. The letter discusses the necessity of winning the Demjanjuk case, and has as [**23] attachments all of the SLU's memoranda on Demjanjuk. Among these memoranda is one from Parker and Moscowitz to the State Department requesting assistance in obtaining further information from the Soviet Union. The memorandum notes that the Soviets had sent materials in June 1978 relating to the investigation of Fedorenko (the Fedorenko Protocols), and continues: "Please thank the [Soviet] Ministry for sending these materials which have been very useful." Jt. App. 218. The October 23, 1978 letter shows that a copy was placed in the Demjanjuk file. It seems clear that even if the Fedorenko documents were "just put back in the Fedorenko files," anyone working with the Demjanjuk files had the substance of those documents, if not the documents themselves, available.

There were clear signals that the Fedorenko documents were significant in the Demjanjuk investigation. As we have noted, the Fedorenko Protocols contained, inter alia, the statements of Soviet citizens Malagon and Leleko, both guards at Treblinka, who identified Marchenko as an operator of the gas chamber. Leleko's statement clearly said that there were two Ukrainian operators of the gas

chambers, "Marchenko and Nikolay" and [**24] identified Marchenko as the "motorist" who committed some of the very atrocities with which Demjanjuk was charged. Leleko said that Marchenko mutilated Jewish victims, cutting off breasts of women. Demjanjuk argues that this evidence provided the strongest possible support for their basic contention in all the proceedings that Demjanjuk was the victim of misidentification. Though the Treblinka survivors who identified Demjanjuk as Ivan the Terrible probably believed they recognized him from the two photographs exhibited to them, it had been 30 to 40 years since any of them had their last opportunity to observe the Ukrainian guard Ivan Grozny. On the other hand, Leleko's statement was made immediately [*346] after the war. The Israeli Supreme Court considered more eyewitness survivor identifications than the American courts; yet, it found that statements made to Soviet authorities identifying Marchenko as "Ivan" raised sufficient doubt about the identification of Demjanjuk to require reversal of Demjanjuk's conviction and his release. It seems clear that the American courts considering Demjanjuk's fate should have had those documents that were in OSI's possession in 1981 that pointed to Ivan [**25] Marchenko as Ivan the Terrible.

IV.

After working on the Demjanjuk case for several years, OSI attorney George Parker became convinced that OSI lacked sufficient evidence that Demjanjuk was Ivan the Terrible of Treblinka. On February 28, 1980, Parker wrote a memorandum entitled "Demjanjuk--A Reappraisal," addressed to Walter Rockler, Director, and Allan Ryan, Deputy Director of OSI, setting forth his doubts. He urged the addressees to read the memorandum and be prepared to make a decision about how to proceed with **Demjanjuk** (the denaturalization case had been pending for more than

two years and was nearing trial) in the near future. This memorandum is annexed hereto as Appendix 7.

A.

Parker's memorandum discussed the background of the Demjanjuk investigation, which began when attorneys in the SLU became aware of a brief reference to Demjanjuk at Sobibor in a book called **Lest We Forget**. The book also referred to a document later denominated the "Trawniki Card," containing a photograph identified as being that of Ivan Demjanjuk. It was only after Treblinka survivors who were interrogated by Israeli police identified the person pictured on the card as a guard at Treblinka [**26] rather than at Sobibor that the SLU shifted its focus and began preparing a case against Demjanjuk as Ivan the Terrible. All other evidence, including the statements of Danilchenko and two other Ukrainian guards questioned by Soviet authorities, identified Demjanjuk as a guard at Sobibor and Flossenburg, but not at Treblinka.

Furthermore, Parker's memo pointed out, both the Polish and Soviet governments had compiled lists of guards at Treblinka, and Demjanjuk's name appeared on neither one, though "the two Ukrainians who incessantly worked at the gas chambers were well known." This portion of the memorandum concludes: "Given these circumstances it is disturbing, as Norman Moscowitz has pointed out repeatedly, that Demjanjuk's name does not appear on either list."

After reviewing the available admissible evidence and the "flaws" with the Treblinka evidence, the memorandum sets forth Parker's views of "Strategic Options; Ethical Responsibilities" of OSI as he sees them. This section of the memorandum begins with these words:

We have little admissible evidence that defendant was at Sobibor yet serious doubts as to whether he was at Treblinka. Even if we may be comforted that we may have [**27] the right man for the wrong act, the ethical cannons [sic] probably require us to alter our present position.

The memorandum then sets forth four options and Parker's recommendation as to each.

Option 1 would be to maintain the status quo, that is, to "proceed with the Treblinka case as presently plead." (The denaturalization complaint did not mention Sobibor or Trawniki, only Treblinka.) Assuming canons of ethics that caution against prosecutors going forward in a criminal case in which they have serious doubts apply to the denaturalization case, Parker "strongly recommended" against this option. Parker recognized that a denaturalization proceeding is technically a civil rather than a criminal action, but expressed the view that the consequence to a defendant who loses such a case--deprivation of citizenship--is so severe that this stricture of the canons should be followed.

Option 2 would be to strike claims that Demjanjuk was at Treblinka and substitute claims that he was at Trawniki and Sobibor. Parker described this course of action as [*347] "tactically suicidal" and "a strategic blunder," primarily because it placed too much reliance on the Trawniki Card.

Option 3 would be to dismiss [**28] the case--at least temporarily--and attempt to beef up the Sobibor evidence. The memorandum recommended against this option because of "largely political" negative factors, and the possibility that the court might not permit refiling.

Option 4 would be to amend the pleadings to add allegations that Demjanjuk served at Sobibor and Trawniki in addition to the allegation that he was Ivan the Terrible of Treblinka. This would shift the focus from testimony of Treblinka survivors describing the heinous crimes of Ivan the Terrible to a mere showing that Demjanjuk was a Russian POW trained by the Germans as a guard, who served as a guard at an extermination camp. Parker did not make a recommendation with respect to Option 4, but repeated his opinion that a change in course was absolutely required by ethical considerations.

Parker's superiors eventually decided to amend the pleadings to add allegations about Sobibor and Trawniki, but to proceed with the case on the basis of proving that Demjanjuk was Ivan the Terrible and to rely principally on photo identifications by Treblinka survivors. Parker resigned from the Department of Justice before the denaturalization trial and Norman Moscowitz [**29] took over as lead attorney for OSI.

B.

The Special Master found that the Parker memorandum is "authentic." S.M. Report at 100-01. This was an issue, because no one in OSI could locate it; Parker produced a copy of the memorandum and cover letter on October 8, 1992, in proceedings before the master.

Rockler testified that he could not remember receiving the memorandum. Ryan testified that he could not have received it, or he would have done something about it. The master stated that Ryan's testimony should be taken "with a grain of salt," and we agree with this assessment. Moscowitz testified that he did not receive the memorandum, but was aware of Parker's doubts about the identifications of Demjanjuk by survivors of Treblinka. The

master found that there was a meeting shortly after the memorandum was written at which the question of amending the pleadings in the Demjanjuk case was discussed. Although there was considerable inconsistency in the testimony of the attorneys who attended the meeting, the master found that all were telling the truth to the extent they remembered the meeting at all. The master further concluded that Rockler found no irreconcilable discrepancies in the [**30] Demjanjuk evidence and that the evidence in hand was sufficient to go forward. On that basis, Parker's views were rejected by Parker's colleagues within OSI. S.M. Report at 103-09.

The master absolved Moscowitz of blame for not sharing Parker's ethical concerns and proceeding to prosecute the denaturalization case with the Ivan the Terrible allegations as its centerpiece. Moscowitz testified that he had concluded that while Demjanjuk's primary duties were at Treblinka, the Trawniki training camp was also a transfer point for guards. Thus, it was not impossible for Demjanjuk to have been at Treblinka at times the survivors claimed they saw him operating the gas chambers and committing other atrocities there, and to have served at Sobibor at other times. S.M. Report at 113-18.

The "most striking aspect" of the Parker memorandum, according to the master, "is its complete silence regarding the references [in the Fedorenko documents] to a man named Marchenko at the gas chambers." S.M. Report at 112. Parker's doubts were based on the apparent impossibility of Demjanjuk's having been a guard at both Sobibor and Treblinka during the relatively brief time both were in operation, and his uneasiness [**31] about the survivor identifications so long after the events. Parker did not make the Marchenko connection. Moscowitz testified that when he became aware of the evidence identifying Marchenko as Ivan the Terrible, he assumed that

Demjanjuk had adopted Marchenko (a common Ukrainian name, and Demjanjuk's mother's maiden name) as an alias. The problem with this [*348] explanation is that Moscowitz also relied on the Trawniki card containing Demjanjuk's name and photograph as significant evidence that he was Ivan the Terrible of Treblinka. It is hard to understand how he could have been sent from Trawniki to Treblinka as Demjanjuk and then assumed the name Marchenko while working there. Surely the meticulous Germans in charge at Treblinka would have noticed the discrepancy.

In his memorandum, Parker wrote that adopting Option 4, amending the pleadings to add Sobibor and Trawniki allegations, would be "simply a ruse to avoid the ethical problems" identified in Option 1. The master found that amending in this way was not a ruse because Moscowitz and others believed in good faith that transfers did take place through Trawniki between camps and that Demjanjuk had served at both Treblinka and Sobibor. [**32] S.M. Report at 123.

While recognizing the significance of the Parker memorandum as a document which raised important questions about the handling of the Demjanjuk case, the Special Master concluded that it was not a "smoking gun" insofar as his inquiry was concerned. The master held that because OSI attorneys acted on the basis of good faith belief in Demjanjuk's guilt as Ivan the Terrible their disagreements with Parker's conclusions were irrelevant with respect to the issue of fraud on the court. S.M. Report at 117. While we agree that the Parker memo alone would not be a sufficient basis for a finding of fraud on the court, it raised a clear warning that there were ethical perils in continuing to prosecute Demjanjuk as Ivan the Terrible.

When his superiors and colleagues at OSI refused to heed his warning, Parker resigned.

V.

A.

The government argued in its brief to the Special Master that mere nondisclosure can never be fraud on the court. The master rejected the argument as a misinterpretation of this court's statement in **H. K. Porter Co. v. Goodyear Tire & Rubber Co.**, 536 F.2d 1115, 1118 (6th Cir. 1976), that "allegations of nondisclosure during [**33] pretrial discovery are not sufficient to support an action for fraud on the court." The government quoted this statement out of context. When the context is examined, it is clear that the court in **Porter** was concerned with a claim of fraud based on an attorney's failure to disclose documents not requested by opposing parties that pertained to confidential disclosures from a client. The master stated, correctly we believe, that HN2⇧ it would be error "to exclude from the definition of fraud on the court intentional, fraudulent nondisclosure during discovery." S.M. Report at 187-88.

The Special Master set forth the elements of fraud upon the court as consisting of conduct:

1. On the part of an officer of the court; 2. That is directed to the "judicial machinery" itself; 3. That is intentionally false, willfully blind to the truth, or is in reckless disregard for the truth; 4. That is a positive averment or is concealment when one is under a duty to disclose; 5. That deceives the court.

As shown by his description of the third element, and repeated in his opinion, the master held that the intent

requirement "is satisfied by proof of actual intent to defraud, of willful blindness to [**34] the truth, or of **a reckless disregard for the truth**." S.M. Report at 185-86, 190 (emphasis added).

B.

We have trouble squaring this definition with the master's ultimate conclusion. The master stated that "a careful reading of Mr. Demjanjuk's discovery requests demonstrates that he asked for virtually every piece of evidence that is at issue in these proceedings," but the government did not provide the evidence because it believed it was under no duty to do so. S.M. Report at 204. The government attorneys had the same obligation as the master to give these requests a "careful reading." The master also faulted Demjanjuk's attorneys for failing to pursue every lead provided by the responses that the government did make. That may be a [*349] correct assessment as to some leads, but Demjanjuk's attorneys were depending on government attorneys to root out information in the possession of foreign nations and to provide it. This was so because only the government has the contacts and resources necessary to obtain information from foreign governments, and because a government attorney agreed to do just that at a pretrial hearing before a magistrate. S.M. Report at 157.

This case involves more [**35] than discovery obligations, however. Ryan testified that he had stated many times that OSI had a policy and practice of turning over exculpatory information even if it had not been requested in discovery. Transcript, Jan. 29, 1993, at 32-40. The other OSI attorneys testified that they knew of no such policy.

While the denaturalization case was before the Supreme Court on Demjanjuk's petition for certiorari, Demjanjuk

received from private sources a copy of the August 1979 letter from a Polish official to Martin Mendelsohn concerning the report of the Polish Main Commission. Demjanjuk requested information about the Polish report. Moscowitz responded and sent a part of the Commission materials. John Martin, Demjanjuk's attorney, immediately wrote to Allan Ryan, then director of OSI, requesting copies of the document described in the letter. OSI attorney Bruce Einhorn drafted a response and sent it to Ryan for approval. This second response stated that "all relevant and discoverable documents in the Government's possession have been provided to you under the Federal Rules of Civil Procedure." The letter went on to decline the request for "further discovery." The master found that this [**36] letter was sent to Martin with a copy to Judge Battisti, apparently with Ryan's approval. S.M. Report at 135-36. These responses do not square with Ryan's professed policy. The OSI letter is couched in terms of the requirements of the discovery rules and limiting production to documents specifically requested, not one of disclosing all exculpatory information.

C.

The Special Master based his ultimate conclusion that Demjanjuk failed to prove fraud on the court almost exclusively on his finding that the OSI attorneys acted in good faith. While he stated that they were not reckless, he did not discuss this finding at all. Instead, he emphasized his finding that "they did not intend to violate the Rules or their ethical obligations . . . . they did not misstate facts or the law as they understood them, and did not make statements in ignorance while aware of their ignorance. Although they were blinded to what we may now perceive to be the truth, they were not willfully blind." S.M. Report at 206.

The quoted findings are based largely on credibility determinations. Although we might not agree with each finding, giving them the required deference, we cannot find them clearly erroneous. [**37] The conclusion that the OSI attorneys were not reckless, however, stands on a different footing. Given the Special Master's finding of no deliberate or willful failure to disclose information arising from an evil motive, we believe the type of reckless disregard to be examined in this case is the second type described in the Restatement (Second) of Torts § 500, comment (a):

HN3⇧ Recklessness may consist of either of two different types of conduct . . . In [the second type], the actor has . . . knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so. An objective standard is applied to him, and he is held to the realization of the aggravated risk which a reasonable man in his place would have, although he does not himself have it.

Such recklessness can and should be determined from an objective examination of the actions of the parties in a particular set of circumstances. We will undertake such an objective examination, accepting as true that no OSI attorney deliberately withheld from Demjanjuk or the court information that he believed he had a duty to disclose even though the [**38] withholding itself was deliberate.

VI.

A.

The attitude of the OSI attorneys toward disclosing information to Demjanjuk's [*350] counsel was not consistent with the government's obligation to work for justice rather than for a result that favors its attorneys'

preconceived ideas of what the outcome of legal proceedings should be. The master found that the OSI attorneys operated on the premise that Demjanjuk was Ivan the Terrible and that this belief caused them to be "inadequately skeptical" of their case when confronted with evidence pointing to Marchenko as Ivan Grozny. S.M. Report at 202-03. We do not believe their personal conviction that they had the right man provided an excuse for recklessly disregarding their obligation to provide information specifically requested by Demjanjuk (as found by the master) the withholding of which almost certainly misled his counsel and endangered his ability to mount a defense (as found by the master).

B.

The OSI attorneys acted with reckless disregard for their duty to the court and their discovery obligations in failing to disclose at least three sets of documents in their possession before the proceedings against Demjanjuk ever reached trial. [**39]

1. The Fedorenko Protocols should have been disclosed. They consisted of information provided by a foreign government that supplied some support to Demjanjuk's basic claim from the beginning--that he was a victim of misidentification. The statements of the two former guards at Treblinka identified one of the Ukrainians who operated the gas chambers as "Marchenko." In his statement, taken in 1945 near the end of World War II, the guard Leleko named Nikolai and Marchenko as the "motorists" and stated that Marchenko had cut women's breasts with his sword. In addition, the protocols contained the transcription of a detailed taped interrogation of Fedorenko conducted in 1973 by Soviet officials. Fedorenko stated that he remembered two guards at the gas chambers, Nikolay and Ivan. Two Jewish survivors, Rosenberg and Epstein, had

also described two operators of the gas chambers called Nikolai and Ivan. Marchenko's given name was Ivan.

The guard Malagon also identified Marchenko as a motorist in a 1978 statement. He referred to him, however, as "Marchenko, Nickolay," providing support for the OSI theory that Marchenko was the Nikolai described by some survivors and Demjanjuk was the notorious [**40] Ivan. This theory was weakened, however, by the fact that Marchenko's name appeared on the list of Treblinka personnel furnished by the Soviet government and Demjanjuk's name did not appear. This same witness, Malagon, identified Demjanjuk's photograph as that of a cook at Treblinka, not as Ivan the Terrible when he was interrogated on October 2, 1979.

The information in the Fedorenko Protocols would have bolstered Demjanjuk's contention that he was not Ivan Grozny of Treblinka, and would have provided information pointing toward Marchenko as the notorious Ukrainian. The information would have assisted the district court as well. The court heard no evidence in support of Demjanjuk's claim of misidentification beyond his own denial. This information would have shown the court that there was evidentiary support available, and in the government's possession, that supported that denial.

2. The list of Ukrainian guards at Treblinka furnished to OSI by the Polish government was certainly exculpatory. In 1982 Demjanjuk's attorney advised OSI Director Allan Ryan that he had learned of 1979 correspondence between the director of the Polish Main Commission Investigating Nazi Crimes in Poland [**41] and OSI attorney Martin Mendelsohn and requested copies "pursuant to discovery motions and interrogatories . . . ." Jt. App. 149. Attorney Moscowitz responded on August 17, 1992, enclosing copies of the reports from Poland. Moscowitz advised that

OSI was furnishing the material "as a matter of courtesy and not under any obligations of discovery, which ended long ago." Jt. App. 150.

Demjanjuk's attorney persisted, asking for copies of any other documents received from foreign governments (a duty to furnish such documents existed from the time of Demjanjuk's first set of interrogatories, the master found). Attorney Bruce Einhorn replied for OSI that "all relevant and discoverable documents in the Government's possession have [*351] been provided to you under the Federal Rules of Civil Procedure." The letter also advised that OSI had undertaken no inquiry to determine whether other documents being sought had already been provided "or indeed whether such documents even exist." Jt. App. 152.

The 1979 letter from the Polish Main Commission advised that the Commission had no data concerning Demjanjuk. Jt. App. 502. Among the documents forwarded with the director's letter was a list of known Ukrainian [**42] guards who had worked at Treblinka. Both Fedorenko and Marchenko's names appeared on the list. Demjanjuk's name did not appear.

Both Parker and Moscowitz, the two OSI attorneys most involved in preparing the Demjanjuk denaturalization case, saw the material from the Polish Main Commission. Parker testified that he thought the material had no value in the Demjanjuk case, and that he did not notice Marchenko's name. Moscowitz testified he thought it did not relate to the Demjanjuk case. This was a strange conclusion, given the fact that the director of the Commission sent the material in response to a request from OSI for information concerning Demjanjuk and two other individuals. Jt. App. 502.

The Polish Main Commission material would not have

established conclusively that Demjanjuk was not a guard or motorist at Treblinka. There were approximately 100 Ukrainians there at one time or another. Nevertheless, the defense could have argued from the absence of Demjanjuk's name that surely the Polish investigation would have turned up the name of Treblinka's most notorious guard and included that person's name on the list. If Allan Ryan's proclaimed policy of furnishing everything had been [**43] followed, it is clear that the Polish documents would have been furnished in 1979, before the denaturalization trial, not three years later.

3. Otto Horn's identification of Demjanjuk as Ivan Grozny from photo spreads was extremely important government evidence at the denaturalization trial. Horn was a German guard who had been stationed at Treblinka. He was tried for war crimes in 1964 or 1965 and acquitted. His evidence was presented in the denaturalization proceedings in the form of a videotaped deposition taken in Berlin on February 26, 1980.

Demjanjuk's counsel objected to testimony on the videotape concerning the identification from photographs on the specific ground that OSI personnel had visited Horn three months earlier, in November 1979, and conducted a photo identification procedure in the absence of Demjanjuk's attorneys. Moscowitz responded that Demjanjuk's counsel had full opportunity to cross-examine Horn when the deposition was taken in 1980.

What neither Judge Battisti nor Demjanjuk's counsel knew was that the contemporaneous reports of the 1979 Horn interview by the OSI investigator and historian directly conflicted with Horn's testimony at the deposition that when [**44] he finally identified Demjanjuk's photograph in the second spread he could not see the first set of pictures. Yet, the reports both stated that Horn was unable

to identify Demjanjuk's photo in the first spread and only did so while examining the second spread and noticing the resemblance between the Demjanjuk photo in that set and the Demjanjuk photo in the first spread, which was lying face-up where Horn could see it as he examined the second set.

As we have noted, Chief Judge Battisti overruled Demjanjuk's objections to the Horn video deposition and found that there were "no aberrations" in the process by which Horn identified a photograph of Demjanjuk as Ivan. We believe that if Demjanjuk's attorneys had had the investigator and historian's reports of the first session, with their strong indication of a suggestive identification procedure, they could have conducted a cross-examination of Horn at the videotaped deposition that would have raised serious questions about the witness' identification.

Both the district court and Demjanjuk's counsel were entitled to have these reports produced. Moscowitz, who was the lead attorney at the denaturalization trial, testified before the Special [**45] Master that he never read the Dougherty and Garand reports before the trial. This, despite the fact that Sinai, to [*352] whom the reports were addressed, clearly directed that a copy be made and sent to Moscowitz. If Moscowitz did not read the reports, knowing he planned to introduce the video deposition at the trial, this failure constituted "reckless disregard for the truth."

OSI was not a large office. We can find no excuse for such casual treatment of information that could cast doubt on the validity of important testimony. Moscowitz was present at the first session with Horn, but testified that he looked away during the actual identification, leaving that to the investigator and historian. He did this, he said, in order to avoid the possibility of being called as a witness at the denaturalization trial when the deposition to be taken a few

months later would be introduced. Not having witnessed the identification himself, we can find no reasonable explanation in this immense record for his failure to read and acknowledge the importance of the contemporaneous reports of the trained investigator and historian, nor can we understand how Sinai determined that two reports addressed to him [**46] should be routed to Moscowitz without even reading them.

VII.

We consider whether the conduct outlined herein constitutes fraud on the court or attorney misconduct sufficiently serious to require corrective action on our part.

A.

HN4 ⇧Fraud on the court is a somewhat nebulous concept usually discussed in civil cases. No court system can function without safeguards against actions that interfere with its administration of justice. This concern must be balanced against the necessity for finality of court judgments; thus, only actions that actually subvert the judicial process can be the basis for upsetting otherwise settled decrees.

Professor Moore's definition is frequently cited:

HN5⇧ Fraud upon the court should . . . embrace only that species of fraud which does or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication, and relief should be denied in the absence of such conduct.

7 **Moore's Federal Practice and Procedure** P60.33. HN6

⇧ Cases dealing with fraud on the court often turn on whether the improper [**47] actions are those of parties alone, or if the attorneys in the case are involved. As an officer of the court, every attorney has a duty to be completely honest in conducting litigation. Professor Moore emphasizes this element of fraud in his treatise:

HN7 ⇧ While an attorney should represent his client with singular loyalty, that loyalty obviously does not demand that he act dishonestly or fraudulently; on the contrary his loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court. And when he departs from that standard in the conduct of a case he perpetrates fraud upon a court.

Id. The author cites two Supreme Court decisions that illustrate the role of attorney actions in the fraud on the court analysis. Moore distinguishes between **Hazel-Atlas Glass Co. v. Hartford Empire Co.**, 322 U.S. 238, 88 L. Ed. 1250, 64 S. Ct. 997 (1944), in which the Supreme Court did find fraud, and **U.S. v. Throckmorton**, 98 U.S. 61, 25 L. Ed. 93 (1878), in which the Court did not find fraud. While the actions taken in both cases were similar--false documents were put before the court--the attorney was implicated in **Hazel-Atlas** as one of the perpetrators, [**48] while the attorney in **Throckmorton** was not. 7 **Moore's Federal Practice** at 60-358-59. See also **Serzysko v. Chase Manhattan Bank**, 461 F.2d 699 (2d Cir. 1972), where the court of appeals as part of its finding of no fraud on the court, pointed out that none of the offending party's attorneys were involved in the alleged fraud. 461 F.2d at 702 n.1.

When the party is the United States, acting through the Department of Justice, the distinction between client and attorney actions becomes meaningless. The Department acts only through its attorneys. Although there are cases

holding that a "plan or scheme" must exist in order to find fraud [*353] on the court, we agree with Judge Wiseman that a scheme, based on a subjective intent to commit fraud, is not required in a case such as this. Reckless disregard for the truth is sufficient.

KENNETH M. BROWN, Appellant; Riggie A. Lott and All Other Inmates That Have Been Subject to the Conditions in the Adjustment Unit v. UNITED STATES OF AMERICA, et al.

No. 81-2083

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

239 U.S. App. D.C. 345; 742 F.2d 1498; 1984 U.S. App. LEXIS 18969

November 7, 1983, Argued En Banc
September 4, 1984, Decided

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the District of Columbia (D.C. Civil Action No. 79-02809).

CORE TERMS: federal law, state law, borrowing, notice, statute of limitations, municipality, cause of action, borrowed, causes of action, notice provision, immunity, civil rights, deficient, tolling, borrow, common law, municipal, notice-of-claims, local law, federal scheme, repose, fill, sovereign immunity, state statute,

appropriateness, six-month, embodied, claimant, limitations period, federal action

COUNSEL: Anne Shere Wallwork (appointed by this court) for Appellant.

Edward E. Schwab, Assistant Corporation Counsel, with whom Charles L. Reischel, Deputy Corporation Counsel, was on the brief, for Appellee District of Columbia.Leo N. Gorman, Assistant Corporation Counsel, entered an appearance for Appellee District of Columbia.

JUDGES: Robinson, Chief Judge, and Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia, and Starr, Circuit Judges. Opinion for the court filed by Circuit Judge Wright, in which Chief Judge Robinson and Circuit Judges Wald, Mikva, Edwards, Ginsburg, and Scalia join. Dissenting opinion filed by Circuit Judge Bork, in which Circuit Judges Tamm, Wilkey, and Starr join. Bork, Circuit Judge, dissenting.

OPINION BY: WRIGHT

OPINION: [*1499] WRIGHT, Circuit Judge:

On October 19, 1979, Yusaf Na'im Salahuddin (then known as Kenneth M. Brown), an inmate of the District of Columbia's reformatory at Lorton, Virginia, filed suit in the United States District Court for the District of Columbia. The suit alleged that conditions in the reformatory's [**2] "Adjustment Unit," where the plaintiff had previously been incarcerated, had unconstitutionally deprived inmates of adequate food, clothing, sanitary conditions, cell space, and educational, religious, legal, and rehabilitative services, and had failed to protect them from physical assault by guards and other inmates. The suit originally sought declaratory

and injunctive relief as well as damages, and it named as defendants a [*1500] number of District of Columbia and federal officials and the District of Columbia itself. Here, we are concerned only with the claim seeking damages from the District of Columbia (the District). n1

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 This action was brought directly under the Constitution pursuant to the theory of *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed 2d 619 (1971). Although after the filing of this action Congress amended 42 U.S.C. § 1983 to include actions taken under color of District of Columbia law, *see* Pub. L. No. 96-170, § 1, Dec. 29, 1979, 93 STAT. 1284, prior to that amendment § 1983 did not apply to D.C. government actions. *See District of Columbia v. Carter*, 409 U.S. 418, 34 L. Ed. 2d 613, 93 S. Ct. 602 (1973). That a constitutional tort claim based on events before the amendment could be based on *Bivens* is clear. *See, e.g., Doe v. District of Columbia*, 225 U.S. App. D.C. 225, 697 F.2d 1115 (D.C. Cir. 1983); *Tarpley v. Greene*, 221 U.S. App. D.C. 227, 684 F.2d 1 (D.C. Cir. 1982).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - [**3]

The District Court, on September 2, 1981, granted a summary judgment motion filed by the District. The part of the District Court's order that concerns us is its holding that the notice of claims provision in the District of Columbia Code, 12 D.C. Code § 309 (1981), applied to plaintiff's action for unliquidated damages against the District.

In relevant part, 12 D.C. Code § 309 provides:

An action may not be maintained against the District of Columbia for unliquidated damages to person or property unless, within six months after the injury or damage was sustained, the claimant, his agent, or attorney has given notice in writing to the Commissioner [Mayor] of the District of Columbia of the approximate time, place, cause, and circumstances of the injury or damage. * * *

Because plaintiff had not filed any notice that would comply with 12 D.C. Code § 309, the District Court granted summary judgment as to the damage action. Plaintiff appealed and argued that Section 309 did not apply to federal causes of action such as his constitution tort action.

While the appeal was pending, a panel of this court decided *McClam v. Barry*, 225 U.S. App. D.C. 124, 697 F.2d 366 (D.C. Cir. 1983), [**4] which held that Section 309's six-month notice of claims requirement *does* apply to federal damage actions against the District. In light of *McClam*, a panel of this court affirmed the District Court's grant of summary judgement with respect to the damage claims against the District, 704 F.2d 1293. On May 19, 1983, this court granted reconsideration *en banc* and vacated the judgment of the panel.

We now hold that *McClam v. Barry* was in error in holding that the six-month notice of claims provision of Section 309 applies to causes of action that, like this constitutional tort claim, n2 are creations of federal law.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n2 Although this action is only under a *Bivens* theory, the broader phrase "constitutional tort" will usually be used in this opinion to account for actions under 42 U.S.C. § 1983. Both sides agree that for purposes of the issues in this case there are no relevant differences between the two types of actions and that precedents from § 1983 law are important to the analysis of this case. "The bodies of law relating to the two forms of litigation have been assimilated in most * * * respects." *Doe v. District of Columbia, supra* note 1, 697 F.2d at 1123.

At times, precedents from one body of law have not been applied to the other. *See, e.g., Carlson v. Green*, 446 U.S. 14, 24 n.11, 64 L. Ed. 2d 15, 100 S. Ct. 1468 (1979). The case for such an assimilation, however, is especially strong in a case such as appellants', where the federal entity is, in effect, a local government that is locally administered (*i.e.*, the District of Columbia). First, local governments are usually subject to 42 U.S.C. § 1983 suits, and thus to apply § 1983 precedents to *Bivens* actions against the District is simply to treat the District like other municipalities. This seems reasonable where there are no federal interests arguing for different treatment. Second, Congress has, in its subsequent amendment to § 1983, *see* note 1 *supra*, made the determination that the District should be treated like other municipalities for purposes of constitutional tort litigation. Third, some of the reasons that have in the past argued for treating *Bivens* actions outside the District differently from § 1983 actions related to the national character of the federal entities challenged in the *Bivens* actions. In *Carlson*, for example, the Court refused to apply a state survival of actions rule to a *Bivens* action against the administrators of the Federal Bureau of Prisons. Among the reasons given by the Court was the need for a uniform federal rule to govern a centrally administered nationwide federal bureaucracy that otherwise might order its affairs to take advantage of differences in state laws. Such concerns

seem much less relevant where the federal entity is a local government whose entire operation is subject to the same "local" law.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [**5]

[*1501] I. THE DECISION IN *McClam v. Barry*

To resolve the issue whether 12 D.C. Code § 309 should apply to federal causes of action, the *McClam* court correctly focused its inquiry on two possible approaches. First, it asked whether Congress, when it enacted Section 309, meant for that section to apply to federal causes of action. 697 F.2d at 369. But it also realized that even if Congress had no such explicit intent the section might still be applicable to federal actions because federal law does at times borrow state legal provisions to complement federal law. Thus, as a second inquiry *McClam* asked whether application of Section 309 was "supported by the rationale of the rule * * requiring application of local statutes of limitations to claims based on federal laws that specify no limitations period." *Id.* at 370.

We agree that these inquiries are the proper ones. That we make two inquiries reflects the existence of two available rationales that could justify applying Section 309 to federal causes of action: First, that Congress may have intended Section 309 itself to alter the normal rules applicable to federal causes of action, and second, [**6] that those normal rules themselves may take account of Section 309 just as they take account of certain other provisions of local law.

The first inquiry thus rests entirely on a rationale of actual congressional intent: Congress, the author of national legislation, may at times intend that its District of Columbia

legislation modify national policies with respect to the District of Columbia. The second inquiry begins with an alternative view of congressional intent: Congress, which is constitutionally responsible for providing a comprehensive body of local law for the governance of the District of Columbia, may see itself as passing local legislation akin to that which any other local legislature might pass. The rationale for applying the provision then rests on established judicial practices concerning when state or local provisions of law should be used as rules of federal law. This approach is in part a judicial positing of congressional intent and in part an examination of the provision's role in state and local law. For example, the rule that federal law borrows from local law when there is no federal statute of limitations in part "rests on deference to the local balancing [**7] of interests embodied in statutes of limitations -- a balancing of the interest in allowing the prosecution of valid claims against the interest in preventing the prosecution of claims that, because of delay, cannot be fairly litigated." *Id.* at 370 (*citing Board of Regents v. Tomanio*, 446 U.S. 478, 487, 64 L. Ed. 2d 440, 100 S. Ct. 1790 (1980); *Johnson v. Railway Express Agency*, 421 U.S. 454, 464, 44 L. Ed. 2d 295, 95 S. Ct. 1716 (1975)).

The *McClam* court apparently concluded that either of the two inquiries would justify the applicability of Section 309 to federal actions. In answer to the first, it concluded that "the D.C. Code provision was an intentional limitation [by Congress] on the right to bring even federal causes of action for damages against the District of Columbia." 697 F.2d at 369. In answer to the second, *McClam* concluded that "the same balancing of interests lies behind the D.C. Code notice provision" as lies behind traditional state statutes of limitations, *id.* at 370, and that Section 309 should thus be borrowed so that federal law as applied in the District of Columbia would reflect that local [**8]

balance.

While we agree that *McClam* made the right inquiries, we disagree with each of its answers.

II. CONGRESSIONAL INTENT AND 12 D.C. CODE § 309

12 D.C. Code § 309 was enacted by Congress in 1933, at least partially in response to this court's *en banc* decision and recommendation in *District of Columbia v. Leys*, 62 App. D.C. 3, 63 F.2d 646, 648 (1932) (on rehearing), *cert. denied*, 289 U.S. 756, 77 L. Ed. 1500, 53 S. Ct. 787 (1983). *See* Pub. L. No. 72-385, 47 STAT. 1370 (1933). The language and purposes of the statute were broad. As *McClam* points out, the language contains no limitations regarding the types of [*1502] actions covered. 697 F.2d at 369. Similarly, the Act's stated purposes -- to provide the District an opportunity to investigate claims when all evidence is still fresh, to allow the District to seek out early settlement of meritorious claims, and generally to protect the District's revenues from unreasonable suits -- would certainly be fulfilled all the more by giving the Act as broad a reading as its language would allow. *See id. See generally* H.R. REP. NO. 2010, 72d Cong., 2d Sess. [**9] (1933) (describing purposes of Act). We do not, however, find these factors conclusive; other factors argue for a narrower view.

Nothing in the history of the Act indicates that Congress ever considered the question whether the Act should apply to federal actions. The *Leys* opinion, which urged the Act's passage, concerned a "garden variety" tort suit against the city; the plaintiff had slipped on a defective sidewalk and brought suit long after the event. Similarly, the report accompanying the bill described the problem to be rectified as that of "numerous instances * * * in which notice of

injury as a result of alleged defective sidewalks, or other conditions, were brought to the [city's] attention * * * by a filing of a suit for damages more than two years after the alleged injury occurred." H.R. REP. NO. 2010, *supra*, at 1. The conclusion that Congress was motivated by the municipality's potential liability for everyday torts is strengthened by the fact that a provision was added which allowed written Metropolitan Police reports to fulfill the notice requirement of the Act. Such reports would have been commonly associated with street accidents and similar events. [**10]

None of this discussion is meant to imply that the scop of Section 309 should be limited to the sorts of "garden variety" negligence actions described above. We do not question the subsequent cases that have given it a far broader application. *See, e.g., Breen v. District of Columbia*, 400 A.2d 1058 (D.C.C.A. 1979) (applying Section 309 to intentional torts). The point is, however, that there is no evidence that Congress envisioned itself to be acting as other than a local legislature protecting a municipality from the threat of excessive common law tort liability. Not only was the problem that Congress discussed one of routine municipal administration -- with no reference to the "unique" or "national" character of the District -- but in its legislative history the Act is explicitly analogized to similar legislation passed in the states to govern other municipalities.

The analogy to municipal notice provisions existing throughout the nation was raised by this court when it first suggested congressional passage of the already introduced notice provision. The *Leys* opinion argued that "provisions of this character appear to be included in [the] bill recently [**11] introduced into [Congress], and are to be found in city charters in Virginia and elsewhere." 63 F.2d at 648. Congress similarly equated the provision with laws

commonly passed by state governments. The report accompanying the bill pointed out that "similar statutes are in effect in 32 States" and sought to justify the length of time allowed for giving notice by comparing it to the provisions in effect in "other jurisdictions." H.R. REP. NO. 2010, *supra*, at 2. All of this persuades us that Congress simply saw itself to be acting as a local legislature when it passed Section 309.

Under the Constitution, Congress has authority to act as the local legislature for the District of Columbia, and thus Congress frequently enacts legislation applicable only to the District and tailored to meet local needs. Absent evidence of contrary congressional intent, such enactments should be treated as local law, interacting with federal law as would the laws of the several states. *See, e.g., Sullivan v. Murphy*, 156 U.S. App. D.C. 28, 478 F.2d 938, 971-973 (D.C. Cir.), *cert. denied*, 414 U.S. 880, 38 L. Ed. 2d 125, 94 S. Ct. 162 (1973). Therefore, [**12] we do not interpret the Congress that passed this apparently local legislation as having intended that it should burden federal causes of action any more than would an analogous state ordinance.

[*1503] III. FEDERAL "BORROWING" DOCTRINE

A. *An Overview of the Doctrine*

The central claim of the District is that even if 12 D.C. Code § 309 is best understood as purely local law, courts should "borrow" it as a rule of federal law when the District is sued. The doctrine of federal borrowing of local law is well established. To effectuate the goals of federal law, courts, when faced with deficiencies in federal schemes, look to other sources of law to "borrow" appropriate provisions. As the Supreme Court has said: "There will often be no specific federal legislation governing a particular transaction * * *. But silence * * * in federal

legislation is no reason for limiting the reach of federal law * * *. The inevitable incompleteness [of federal enactments] means that interstitial federal lawmaking is a basic responsibility of the federal courts." *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593, 37 L. Ed. 2d 187, 93 S. Ct. 2389 (1973). [**13]

One of the principal sources of law that courts turn to to fill the deficiencies in federal schemes is state law. For example, where a federal action contains no statute of limitations courts ordinarily look to state law as a possible source of federal law. *See generally DelCostello v. Int'l Bhd of Teamsters*, 462 U.S. 151, 103 S. Ct. 2281, 76 L. Ed. 2d 476 (1983). Where it would be consistent with the federal policies underlying the action, courts borrow the most appropriate state limitations provisions. *See Burnett v. Grattan*, 468 U.S. 42, , 82 L. Ed. 2d 36, 104 S. Ct. 2924, 52 U.S.L.W. 4916, 4918 (1984); *Johnson v. Railway Express Agency, supra*, 421 U.S. at 462, 464. Indeed, courts have borrowed not only the limitations provisions themselves, but also state tolling policies, which "are * * * integral parts of a complete limitations policy" and which thus give the limitations provisions their meaning under state law. *Tomanio, supra*, 446 U.S. at 488. State provisions other than statutes of limitations and tolling policies, but analogous to them, have also been borrowed to fill gaps in federal law, [**14] *see, e.g., Robertson v. Wegmann*, 436 U.S. 584, 56 L. Ed. 2d 554, 98 S. Ct. 1991 (1978) (borrowing state survivorship of actions rule), though the practice has been less common and the courts have been somewhat less consistent. *See generally* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 829 (2d ed. 1973) (apart from statutes of limitations and their incidents, "the authorities are extremely sparse" concerning the extent to which state "'procedural' and 'quasi-procedural' rules [,]" particularly

those "which may affect outcome[,]" should be borrowed); *id.* at 199-200 (Supp. 1981) (discussing the inconsistent results in cases concerning the extent of borrowing state procedural provisions other than "statutes of limitations and their incidents"); *see also* Hill, *State Procedural Law in Federal Nondiversity Litigation*, 69 HARV. L. REV. 66, 91-94 (1955) (reasons for applying state procedural law are usually weak when dealing with rules other than statutes of limitations).

These borrowing practices are the result of at least two considerations. First, as mentioned above, they [**15] reflect the fact that federal law is frequently "deficient" in that it does not supply the complete legal framework necessary to the fair adjudication of federal causes of action. Although federal law may establish rights, and rights of action for the vindication of those rights, federal law does not always include all the "'procedural' or 'quasi-procedural'" elements that are generally considered necessary to the fair litigation of its causes of action. Where these are absent, it certainly cannot be assumed that the interests normally embodied in those elements were intended to play no part in the federal scheme. *See DelCostello, supra*, 462 U.S. at , 103 S. Ct. at 2287 (where there is no statute of limitations, "we do not ordinarily assume that Congress intended that there be no limit on actions at all"); *Tomanio, supra*, 446 U.S. at 488 (the absence of a statute of limitations cannot be understood as placing policies of [*1504] repose in disfavor); *see also* Hill, *supra*, 69 HARV. L. REV. at 91-92. Thus the courts are faced with the necessity of formulating some rule to fill the deficiency in the federal scheme and thereby to [**16] effectuate federal policy. In this context, the borrowing doctrine is the alternative to judicial formulation of a uniform federal rule.

The borrowing doctrine also rests on deference to the

balances that local law has struck with respect to the interests normally embodied in the elements necessary to, but absent from, the federal scheme. *See Johnson v. Railway Express Agency, supra*, 421 U.S. at 463-464 ("Any statute of limitations * * * reflects a value judgment concerning the point at which the interests in * * * protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones. * * * In borrowing a state period of limitation * * *, a federal court is relying on the State's wisdom * * *."); *McClam v. Barry, supra*, 697 F.2d at 370. With respect to certain statutes, Congress has explicitly codified this borrowing doctrine. *See* 42 U.S.C. § 1988 (1982) (courts should look to state law when federal law is not "suitable to carry [the policies of the Reconstruction Era civil rights statutes] into effect" or when those statutes "are deficient in the provisions necessary to furnish suitable [**17] remedies," so long as rules of state law are not inconsistent with policies embodied in federal law); *Burnett v. Grattan, supra*, U.S. at , 52 U.S.L.W. at 4918; *Johnson v. Railway Express Agency, supra*, 421 U.S. at 464 (linking 42 U.S.C. § 1988 to general federal borrowing practices); *see also Tomanio, supra. But see* Eisenberg, *State Law in Federal Civil Rights Cases: The Proper Scope of Section 1988*, 128 U. PA. L. REV. 499 (1980) (giving very different interpretation of Section 1988). Yet neither when codified nor when used as a "fallback rule of thumb" of federal common law, *DelCostello, supra*, 462 U.S. at n.12, 103 S. Ct. at 2287 n.12, is the doctrine an absolute one to be mechanically applied. State law rules are borrowed out of the need to effectuate federal policies in the face of incomplete federal law, and they are not borrowed if they would incorporate into federal law balances of interests that are inconsistent with the policies underlying the federal action. *See* 42 U.S.C. § 1988; *Tomanio, supra*, 446 U.S. at 487. [**18] As the Supreme Court has recently stated, "Federal courts must be ever vigilant to insure that application of state law poses

'no significant threat to any identifiable policy or interest.'" *Burks v. Lasker*, 441 U.S. 471, 479, 60 L. Ed. 2d 404, 99 S. Ct. 1831 (1979) (*quoting Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68, 16 L. Ed. 2d 369, 86 S. Ct. 1301 (1966)).

As this overview of borrowing doctrine shows, the issue presented by the doctrine is neither how to incorporate into federal law as much state law as a federal action will tolerate, nor how best to further state policies and goals in the litigation of a federal action. The issue is how to best effectuate the federal policies embodied in a federal action when the action does not itself supply the complete legal framework necessary to the effectuation of those policies. Because the practice of borrowing presupposes a need to fill a deficiency in the federal scheme, a court must first look to see if there is indeed such a deficiency. *See Cohen v. Board of Education*, 536 F. Supp. 486, 493-495 (S.D.N.Y. 1982).

B. *The Issue of Deficiency*

This case can [**19] be resolved on this point. We cannot view the federal scheme for adjudicating constitutional torts as deficient for lack of a notice of claims provision. Nor can we view the District of Columbia's notice of claims provision as simply embodying certain interests which are not explicitly provided for in the federal scheme, but which nonetheless should be treated as part of that scheme. In short, there is no deficiency in the federal scheme that would lead us to look to 12 D.C. Code § 309 as a possible source of federal law for effectuating federal policies. "State law is to be resorted to in resolving an issue if, and only if, federal law is deficient, [*1505] and if, and only if, state law 'is not inconsistent with the constitution and the laws of the United States.'" *Jaworski v. Schmidt*, 684 F.2d 498, 500 (7th Cir. 1982) (*quoting* Robertson,

supra, 436 U.S. at 702-703), *cert. denied*, 460 U.S. 1015, 103 S. Ct. 1258, 75 L. Ed. 2d 485 (1983).

Most of the cases involving the limiting of federal causes of action by borrowing state procedural rules have involved the question of whether to borrow state statutes of limitations, [**20] tolling policies, or other rules of response that clearly establish the point at which a cause of action ends. *See, e.g., Tomanio, supra* (tolling policies); *Robertson, supra* (survival of action rule); *Johnson, supra* (statutes of limitations). The courts have emphasized the frequent absence of statutes of limitations from federal enactments, the inherently legislative balancing of interests that goes into the determination of a particular period of limitation (making the judiciary particularly unsuited to make such a determination), and the indispensability of such statutes to our ideals of justice. This last point has been well understood from the beginnings of our federal system. For example, in 1805 Chief Justice John Marshall recognized the indispensability of statutes of limitations when he borrowed a federal criminal statute's limitations period and applied it to a federal civil action for debt brought under a statute containing no limitations provision.

It deserves some consideration, that if [the law] does not limit actions of debt for penalties, those actions might, in many cases, be brought at any distance of time. This [**21] would be utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain for ever liable to a pecuniary forfeiture.

Adams v. Woods, 6 U.S. (2 Cranch) 336, 341, 2 L. Ed. 297 (1805). The point was more recently emphasized by Justice

Rehnquist when he argued for borrowing state statutes of limitations and tolling policies.

On many prior occasions, we have emphasized the importance of the policies underlying state statutes of limitations. [They] are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system. Making out the substantive elements of a claim for relief involves a process of pleading, discovery, and trial. The process of discovery and trial which results in the finding of ultimate facts for or against the plaintiff by the judge or jury is obviously more reliable if the witness or testimony in question is relatively fresh. Thus in the judgment of most legislatures and courts, there comes a point at which the delay of a plaintiff in asserting a [**22] claim is sufficiently likely either to impair the accuracy of the fact-finding process or to upset settled expectations that a substantive claim will be barred without respect to whether it is meritorious. * * *

Tomanio, supra, 446 U.S. at 487.

By logic and tradition, the absence of a statute of limitations is an egregious gap in a cause of action. Whatever the source of a cause of action, *some clear end* to one's liberty to commence suit is necessary. Most decisions concerning the borrowing of state law that would burden federal actions have arisen from this need to borrow provisions, such as statutes of limitations, tolling policies, and survival rules, that serve the exclusive purpose of defining that point where the right to maintain a cause of action ends. n3

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n3 There is another class of cases in which state law is used to supplement federal enactments. It involves federal enactments in fields that have traditionally been left to state regulation. In those cases, where there is no background of federal law -- and indeed where the regulated relationships may even be relationships that are the creations of state law -- Congress is not assumed to have ignored those preexisting state legal relationships. In that sense, federal enactments can be assumed to be "incomplete" or "deficient," and state law is commonly borrowed to fill the "gaps." *See, e.g., Burks v. Lasker*, 441 U.S. 471, 60 L. Ed. 2d 404, 99 S. Ct. 1831 (1979) (borrowing state law provision regarding corporate directors' power to terminate derivative suits, even where cause of action is federal statute: "'Corporations are creatures of state law,' and it is state law which is the font of corporate directors' powers." *Id.* at 478 (*quoting Cort v. Ash*, 422 U.S. 66, 84, 45 L. Ed. 2d 26, 95 S. Ct. 2080 (1975)). This case does not involve the issue of how to supplement federal legislation of limited scope enacted in a field that has traditionally and primarily been subject to pervasive state regulation. Thus the logic of those cases cannot be the basis of assuming a deficiency in federal law in this case.

---------- End Footnotes- - - - - - - - - - - - [**23]

[*1506] The *McClam* opinion concluded that "the same balancing of interests lies behind the D.C. Code notice provision" as lies behind statutes of limitations -- "a balancing of the interest in allowing the prosecution of valid claims against the interest in preventing the prosecution of claims that, because of delay, cannot be fairly litigated." 697 F.2d at 370. Similarly, the District argues that there are no significant differences between a traditional statute of limitations and the D.C. Code's notice

provision. Although it is true that Congress was clearly concerned with ensuring the freshness of evidence when it passed 12 D.C. Code § 309, that does not resolve the issue. At a minimum, we must note that a notice provision has a very different relationship to a cause of action than that of a statute of limitations, tolling provision, or survival rule.

No one disputes that if 12 D.C. Code § 309 were applied to a federal cause of action, it would be wholly independant of relevant limitations, tolling, and survival provisions, which would all remain applicable. While these latter provisions all operate to define the point of repose, after which expectations [**24] become settled, the notice of claims provision does something different. Of course, if it is not complied with, and there are no grounds for waiver, it bars an action, and thus it acts to create settled expectations; but this is simply a penalty for noncompliance. The provision's function is to compel notice so that the municipal defendant may investigate early, prepare a stronger case, and perhaps reach an early settlement. The need to apply traditional provisions of repose (statutes of limitations, tolling provisions, and survival rules) remains unchanged, since the notice provision has a purpose that is quite distinct.

It is important to our inquiry that a notice of claims provision supplements rather than replaces a traditional statute of limitations and operates in a quite different manner than does such a statute of limitations. Before examining the exact policies served by the provision, we must emphasize that its borrowing does not have the same support in tradition that the borrowing of a statute of limitations would have. This point does not simply rest on a belief in an inherent value to tradition; it rests instead on the fact that borrowing may be explained as a judicial [**25] positing of congressional intent. Because statutes of limitations are such universally familiar procedural aspects of litigation, and because they are so

generally understood as essential to a fair scheme of litigation, the judiciary is safe in assuming that Congress intended (or at least would have intended) to limit all congressionally created causes of action by statutes of limitations. In other words, the judiciary can safely look at the absence of a limitations provision as a deficiency. n4

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n4 If the cause of action is a federal common law action implied by the Constitution, no different analysis is called for. Unless there are reasons to do otherwise, courts should shape federal common law to conform to the general structure of analogous federal statutory litigation. *Cf. Doe v. District of Columbia, supra* note 1, 697 F.2d at 1123 (the law surrounding *Bivens* actions has for the most part assimilated the law surrounding 42 U.S.C. § 1983 actions).

- - - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [**26]

The judiciary is on less secure ground, however, when it limits statutory or common law causes of action with procedural rules embodying interests that are not as universally understood to be essential to fair litigation as are the repose interests embodied in traditional statutes of limitations. The absence of such rules in the cause of action cannot as easily be termed a deficiency. Indeed, the ground is less secure even when the rules embody interests similar to those embodied in traditional [*1507] statutes of limitations but implement those interests in a less universally accepted manner. While the borrowing of state statutes of limitations is supported by both the need for some limitations provision and the tradition of borrowing from state law to supply it, in most other instances the application of local procedural rules that would

significantly inhibit the ability to bring federal actions will be neither as reasonable nor as necessary. *Accord* Hill, *supra*, 69 HARV. L. REV. at 91-94. n5

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n5 The dissent's understanding of when a deficiency exists in federal law does not appear to incorporate a consideration of the necessity or reasonableness of the type of state rules to be borrowed. According to the dissent, "federal law should be considered 'deficient' and courts should turn to the law of the forum state if federal law does not cover the issue." Dissenting opinion at 1512. This approach apparently contemplates that the simple absence of any provision of state law from federal law automatically implies a deficiency in federal law, regardless of whether or not such a provision is in any way necessary or helpful to or even consistent with the execution of the federal law in question. This interpretation is unsupported by existing case law. *See, e.g., Robertson v. Wegmann*, 436 U.S. 584, 588, 56 L. Ed. 2d 554, 98 S. Ct. 1991 (1978) (noting that federal law is "deficient" when it is "'unsuited or insufficient "to furnish suitable remedies"'") (*quoting Moor v. County of Alameda*, 411 U.S. 693, 703, 702, 36 L. Ed. 2d 596, 93 S. Ct. 1785 (1973), *quoting* 42 U.S.C. § 1988). *See also Board of Regents v. Tomanio*, 446 U.S. 478, 483-484, 64 L. Ed. 2d 440, 100 S. Ct. 1790 (1980) (borrowing state statute of limitations after referring to absence of such statute in federal law as a "void" *and* after citing previous cases that had determined that such an absence warranted borrowing). In essence, existing case law appears to find a deficiency only where the particular type of provision in question is deemed necessary and reasonable. (This determination in turn assumes, though this point is almost too obvious to require statement, that the type of provision is consistent with the federal law at

issue. *Cf. infra* slip op. at 21-22.) Statutes of limitations, for example, though not directly indicated as necessary by the existence of a federal cause of action, are so universal that their necessity and reasonableness have been accepted.

The dissent also appears to depart from existing case law in its analysis of the appropriateness of the particular provision at issue, which it undertakes after having determined, using the analysis described in the previous paragraph, that a deficiency exists in the federal scheme in question. Relying on the recent Supreme Court case of *Burnett v. Grattan*, the dissent concludes that the notice provision at issue in this case is appropriate for borrowing because of its lack of "functional differences" with the federal cause of action here. Dissenting op. at 1516. The dissent's interpretation of *Burnett*, however, does not appear to accurately reflect that case. In *Burnett*, the Supreme Court determined that a particular state statute of limitations was not appropriate for borrowing for two reasons. First, the statute in question was inappropriate when applied to the federal cause of action in the case because it "fail[ed] to take into account practicalities that are involved in litigating" the type of federal claim at issue. *Burnett v. Grattan*, 468 U.S. 42, , 82 L. Ed. 2d 36, 104 S. Ct. 2924, 52 U.S.L.W. 4916, 4919 (1984). Second, the statute was inappropriate because the goals it was designed to achieve were inconsistent with the objectives underlying that cause of action. *Id.* at , 52 U.S.L.W. at 4919-4920. The dissent's purported application of *Burnett* involves a curious reading of this determination. First, the dissent focuses solely on the "practicalities" part of the analysis and neglects to consider the policy part at all. Second, in performing the "practicalities" part of the analysis, the dissent notes that because none of the particular hindrances to appropriateness mentioned in *Burnett* appear to be present in this case the provision is appropriate. *See* dissenting op. at 1516-1518. Yet the Supreme Court in

Burnett found simply that where those particular hindrances were present, a provision was not appropriate to borrow; it did not find that the absence of those hindrances would prove appropriateness. Thus the dissent's analysis of the appropriateness of borrowing the notice provision is both incomplete and erroneous.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[**27]

C. *The Role of 12 D.C. Code § 309 in Local Law*

With these considerations in mind, we turn to the District's contention that 12 D.C. Code § 309 should, in spite of its differences, be analogized to a local statute of limitations and thus be adopted as a federal rule of law. To evaluate the argument, we must turn to the role that the provision plays in the local legal scheme -- both its method of operation and the interests it serves. In addition to examining the provision's legislative history, which we have done above, we should also examine the District of Columbia courts' understanding of the provision. *See* 11 D.C. Code § 102 (1981) (District of Columbia Court of Appeals is "highest court of the District of Columbia"); *Thompson v. United States*, 179 U.S. App. D.C. 76, 548 F.2d 1031, 1035 (D.C. Cir. 1976) (D.C. [*1508] Court of Appeals rather than this court is final expositor of local law).

In spite of the District's insistence that the provision is closely akin to a statute of limitations, quite a different image emerges from the opinions of the District of Columbia Court of Appeals. That court has refused to view the provision as [**28] similar to a statute of limitations.

See Gwinn v. District of Columbia, 434 A.2d 1376 (D.C.C.A. 1981).

1. 12 D.C. Code § 309 as a condition precedent to the accrual of rights against the municipality.

In *Gwinn*, the District of Columbia Court of Appeals decided that Section 309's notice provision was not subject to those tolling policies that would apply to a statute of limitations. The court's reasoning is particularly significant. The court argued that compliance with the provision was a condition precedent to the very existence of any "'right of action' or 'entitlement to maintain an action'" for tort damages against the municipality. *Id.* at 1376. This distinguished the provision from a statute of limitations and made the statute of limitations' tolling principles inapposite because they "presuppose[] that a 'right of action' exists and that the claimant is 'entitled to maintain' that action." *Id.* Unless notice is given, according to *Gwinn*, no right of action ever accrues. In effect, under *Gwinn*, compliance with the provision is considered an element in any damage cause of action against the municipality.

The way [**29] *Gwinn* characterized the operation of the notice provision makes it more difficult to view it as filling a deficiency in federal law. State law is not usually thought to add elements to federal rights of action. A court may safely posit that federal lawmakers, when setting out the elements of a cause of action, do not usually intend that there should forever remain a remedy available once those elements are established. *See Tomanio, supra*, 446 U.S. at 488. It is much more difficult to assume that those lawmakers, when they set out the elements of a federal cause of action, would normally intend for additional and unstated elements to be also considered necessary, and for state law to be consulted to supply those missing (yet necessary) elements of the federal action. In particular,

nothing in federal borrowing doctrine leads us to believe that state law can precondition the accrual of federal rights of action. *Cf. Campbell v. Haverhill*, 155 U.S. 610, 618, 39 L. Ed. 280, 15 S. Ct. 217 (1895) (arguing that a federally created right of action can be limited by a state statute of limitations because "statutes of limitations affect the remedy only, [**30] and do not impair the right"); *Bomar v. Keyes*, 162 F.2d 136, 140-141 (2d Cir. 1947) (Hand, J.) (statutes of limitations are normally treated as going to the remedy and not as a condition to the federal right of action), *cert. denied*, 332 U.S. 825, 92 L. Ed. 400, 68 S. Ct. 166 (1947); *see also Cohen v. Board of Education, supra*, 536 F. Supp. at 493-495.

2. 12 D.C. Code § 309 as a condition on the District's waiver of municipal tort immunity.

When we examine the policy reasons given by the District of Columbia Court of Appeals to support its construction and formal characterization of Section 309, we find that those reasons also undermine the argument that it would fill a deficiency in federal law just like a traditional statute of limitations. The District of Columbia Court of Appeals has consistently understood the notice requirement of Section 309 to be a condition placed on the partial waiver of the District's sovereign immunity. *See Gwinn, supra*, 434 A.2d at 1378 & n.3; *Kelton v. District of Columbia*, 413 A.2d 919, 920 (D.C.C.A. 1980); *Wilson v. District of Columbia*, 338 A.2d 437, 438 & n.2 (D.C.C.A 1975). [**31] As a matter of local common law the District has waived most of its traditional municipal tort immunity, although it still retains some. *See generally Chandler v. District of Columbia*, 404 A.2d 964, 965 & n.2 (D.C.C.A. 1979) (discussing continued validity of sovereign immunity [*1509] in District of Columbia law); *Spencer v. General Hospital*, 138 U.S. App. D.C. 48, 425 F.2d 479 (D.C. Cir. 1969) (*en banc*) (discussing history of immunity,

abandoning "governmental-proprietary" test for defining immunity, and adopting "discretionary function" test for defining immunity); *Elgin v. District of Columbia*, 119 U.S. App. D.C. 116, 337 F.2d 152 (D.C. Cir. 1964) (same). The view that 12 D.C. Code § 309 was a condition on the waiver of municipal immunity has influenced the District of Columbia Court of Appeals' construction of that provision. *See, e.g., Gwinn, supra*, 434 A.2d at 1378.

To the extent that 12 D.C. Code § 309 accommodates plaintiffs' interests and notions of municipal immunity, it does not correspond to any deficiency in the federal law, nor indeed would it be well-fitted to filling any such deficiency. [**32] The role in constitutional tort litigation of state law immunities in general, and municipal immunities in particular, has been the subject of substantial federal law. In *Owen v. City of Independence*, 445 U.S. 622, 63 L. Ed. 2d 673, 100 S. Ct. 1398 (1980), the Supreme Court held that "by including municipalities within the class of 'persons' subject to liability for violations of the Federal Constitution and laws, Congress -- the supreme sovereign on matters of federal law -- abolished whatever vestige of the State's sovereign immunity the municipality possessed." *Id.* at 647-648 (footnote omitted). Moreover, the Court explicitly discussed the two principal common law theories of municipal immunity -- each of which has, at different times, been the basis of the District's municipal immunity -- and rejected the proposition that either could limit suits under 42 U.S.C. § 1983. 445 U.S. at 644-650. Even before *Owen* clarified the content of federal law, the Seventh Circuit, in an opinion by Judge (now Justice) Stevens, held that the issue of tort immunity was controlled by uniform federal law rather than by [**33] borrowing from state law. *Hampton v. City of Chicago*, 484 F.2d 602, 607 (7th Cir. 1973), *cert. denied*, 415 U.S. 917, 39 L. Ed. 2d 471, 94 S. Ct. 1413 (1974). *Hampton* was quoted with approval and its conclusion was apparently adopted in

Owen's discussion of the inapplicability of municipal immunity concepts to Section 1983 litigation. 445 U.S. at 647 n.30. *See also Jaworski v. Schmidt, supra*, 684 F.2d 498 (law of immunities relating to constitutional torts is federal law unaffected by state provisions). To import notions of municipal immunity from District of Columbia law into federal civil rights law would be to undermine a federal policy rather than to fill a deficiency in the federal scheme.

IV. CONCLUSION

For the reasons discussed above, we overrule the panel opinion in *McClam*. We also note that outside of this circuit the overwhelming majority of federal and state courts that have confronted the issue of borrowing notice of claims provisions have reached the same result that we now reach. n6 Joining these courts, we hold that appellant's noncompliance with 12 D.C. [*1510] Code § 309 cannot [**34] bar his federal claims. Accordingly, it was error to grant the District's motion for summary judgment.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n6 Cases refusing to borrow notice provisions include: *Rosa v. Cantrell*, 705 F.2d 1208, 1221 (10th Cir. 1982), *cert. denied*, 464 U.S. 821, 104 S. Ct. 85, 78 L. Ed. 2d 94 (1983); *Brandon v. Board of Educ.*, 635 F.2d 971, 973 n.2 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123, 71 L. Ed. 2d 109, 102 S. Ct. 970 (1981); *Willis v. Reddin*, 418 F.2d 702 (9th Cir. 1969); *Davis v. Krauss*, 478 F. Supp. 823, 825 (E.D.N.Y. 1979); *Williams v. Posey*, 475 F. Supp. 133 (M.D. Ga. 1979); *Paschall v. Mayone*, 454 F. Supp. 1289, 1298 (S.D. N.Y. 1978); *Perrote v. Percy*, 452 F. Supp. 604 (E.D. Wis. 1978); *Luker v. Nelson*, 341 F. Supp. 111, 118 (N.D. Ill. 1972); *Williams v. Horvath*, 16 Cal. 3d 834, 129

Cal. Rptr. 453, 548 P.2d 1125 (1976); *Overman v. Klein*, 103 Idaho 795, 654 P.2d 888, 892 (1982); *Doe v. Ellis*, 103 Wis. 2d 581, 309 N.W.2d 375 (1981). For a case holding that a notice provision should be borrowed, *see Mills v. County of Monroe*, 59 N.Y.2d 307, 464 N.Y.S.2d 709, 451 N.E.2d 456, *cert. denied*, 464 U.S. 1018, 104 S. Ct. 551, 78 L. Ed. 2d 725 (1983). *Mills* seems to be the only case outside of this jurisdiction holding that a notice provision should be borrowed. The *Mills* opinion, however, partially rests its decision on the unusual flexibility of the relevant New York provision; it was subject to waiver by the court if to waiver would promote equity or the action would vindicate "the public interest." Thus, even *Mills* would not support the District's case here.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [**35]

James DeVita
20 Years of Experience

James A. DeVita has been a practicing attorney in the Washington, D.C. metropolitan area for over 20 years. Licensed to practice in Maryland, Virginia, and the District of Columbia, Mr. DeVita is an experienced trial attorney. As a trial attorney for the United States Department of Justice and the District of Columbia attorney General's Office, Mr. DeVita has handled more than 300 civil cases and has appeared as sole lead counsel in 30 jury trials.

Mr. DeVita has extensive experience in handling:

- *Personal Injury Cases* including Auto Accident, Slip and Fall, Medical Malpractice, Legal Malpractice, Negligence, Products liability, Assault and Battery, Libel and Slander, False Arrest and Police Brutality, Fraud, Intentional Infliction of Emotional Distress, Violation of Right to Privacy
- *Employment Cases* including Wrongful Termination, Racial, Sexual, Age, National Origin and Disability Discrimination, Sexual Harassment, Retaliatory Discharge, Equal Pay, Family and Medical Leave, Negligent Hiring, Non-compete agreements, Misuse of confidential information, trade secrets, customer lists, Tortious interference with contracts, Severance Agreements, Employment Contracts, Security Clearances, Refusal to Hire, Background checks
- *Divorce* and *Family Law* Cases including Divorce, Uncontested Divorce, Alimony, Child Custody, Child Support, Property Division, Separation Agreements, Pre-nuptial agreements, Adoptions, Protective orders, Name changes

- *Criminal Law Cases* including Disorderly Conduct, Shoplifting, Trespass, Damage to property, Larceny, Embezzlement, Theft, Assault and Battery, Drug Possession, Possession of Marijuana, Cocaine, Drunk in Public, Bad Checks Bail, Bail Bonds, Plea Bargains, Trials, Expungement of Prior Criminal Offenses
- *Traffic Cases* including DWI, Driving While Intoxicated, DUI, Driving Under the Influence, Reckless Driving, Driving on a Suspended License, Speeding, Aggressive Driving, Improper Backing, Turning, Passing Signals, Hit And Run
- *Immigration Cases* including Marriage, Family and Employer Based Applications For Permanent Residency (Green Card), H-1B, Temporary Employment Visas, Student Visas, Citizenship Applications, Asylum, Deportation and Removal Proceedings, International Adoption
- *Bankruptcy* and *Collections Cases* including Chapter 7, 11, and 13 Bankruptcy Cases, Collection of Debts, Defending Debtors, Representing Creditors, Debt Counseling, Debt Reorganization, Credit Repair, Foreclosures

Mr. DeVita is willing to provide a free initial consultation to any new client. Mr. DeVita has offices in Arlington, Alexandria, and Tysons Corners,Virginia, Bethesda, and Rockville, Maryland, and the District of Columbia. Please call to make an appointment.

Highlights
Trial Attorney U.S. Department of Justice 1998-2000
Trial Attorney D.C. Office of the Attorney General 1990-1998

Georgetown University Law Center J.D. 1982
University of Massachusetts, B.A. 1979

James DeVita

Personal Injury
Mr. DeVita represents plaintiffs and defendant in Virginia, Maryland, and the District of Columbia in the following types of cases:

- Auto Accidents- automobile accidents involving serious personal injuries
- Slip and Fall- injuries arising out of accidents occurring on private property caused by the negligence of property owners and businesses
- Medical Malpractice - individuals injured due to mistakes made by doctors and other medical professionals
- Legal Malpractice- individuals injured due to mistakes made by lawyers
- Negligence -individuals injured due to another person's carelessness
- Products liability- injuries arising from defective drugs and other products
- Assault and Battery- people injured in fights and assault, improper physical or sexual contact
- Libel and Slander- damage to reputation or business caused by false accusations
- False Arrest and Police brutality- arrests without probable cause, excessive force by the arresting officer
- Fraud- individuals injured due to misrepresentations of facts by others
- Intentional Infliction of Emotional Distress- outrageous conduct which causes a severe emotional reaction
- Violation of Right to Privacy- invasion of privacy

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA CIVIL DIVISION

KENNETH JOHNSON,
Plaintiff,

v.

DISTRICT OF COLUMBIA, *et al.*,
Defendants.

Civil Action No. 98-3837

FILED
CIVIL ACTION BRANCH
Oct 24 2003
Superior Court
of The District of Columbia
Washington, D.C.

MOTION UNDER RULE 60(b) TO VACATE PRIOR JUDGMENT UNDER RULE GROUNDS OF "FRAUD UPON THE COURT" AS HEREIN SET OUT BY THIS MOTION AND MEMORANDUM OF LAW AND POINTS AND AUTHORITIES

Jurisdiction: this court has ancillary jurisdiction as well as independent and substantive equitable jurisdiction. **Venue:** original complaint are incidents occurring in Wash. D.C.

I. INTRODUCTION

Now comes Plaintiff, Kenneth Johnson[1], and pursuant to the Federal Rules of Civil Procedure, Rules 60(b) "fraud upon the court" and fraud upon Plaintiff, 59(a), 59(e), 15(a), and 15(c) respectfully moves this Court to Vacate its Order dated July 15, 1998 granting Defendant's Motion to Dismiss[2], and for Leave to File an Amended Complaint.

---

[1] Until the filing of this Motion, Plaintiff had represented himself as a pro se litigant, which included the filing of all complaints, amendments thereto, and other materials in this case. Plaintiff is now represented by the undersigned counsel.

[2] *See,* Exhibit A, Judge's Order.

The Plaintiff for grounds therefore, says that he has been denied his "day in court" contrary to the due process clause of the Constitution of the United States, 14th Amendment, and would respectfully show this Court as follows:

1. Defendant obtained Judgement against Plaintiff by way of "fraud upon the court" and fraud upon the Plaintiff similarly, as so stated by Plaintiff in this 60(b) motion.

2. ***Controlling case law for "fraud upon the court"***: U.S. Supreme Court decisions in Hazel-Atlas Glass Company v. Hartford Empire Company 1944, 64 S.Ct. 997, 322 U.S. 238, 88L. Ed. 1250.

   Fed.R.Civ.P. 60(b) motion filed in Superior Court for the District of Columbia Attacking Judgment in Johnson I for "fraud upon the court" citing Federal Practice and Procedure, WRIGHT – MILLER – KANE: "The Supreme Court, in an opinion by Justice Black, held that the judgement must be vacated. The Court thought it immaterial that Hazel may not have exercised proper diligence in uncovering the fraud." The Motion to set aside judgement was filed 9 years after the dismissal order was entered, Hazel – Atlas Glass Company v. Hartford Empire Company 1944, 64 S.Ct 997, 322 U.S. 238, 88 L. Ed. 1250, affirmation of dismissal occurred in 1932; Hazel filed petition to set aside judgment under rule 60(b) in 1941, 9 years after the fact.[1] And that's considerably longer than in the Plaintiff's case.

---

[1] *See*, Exhibit B, Excerpts from Federal Practice and Procedure, WRIGHT — MILLER — KANE, with (emphasis added) to the case of Hazel- Atlas Glass Company v. Hartford Empire Company 1944, 64 S.Ct. 997, 322 U.S. 238, 88 L.Ed. 1250.

U.S. Supreme Court controlling case law: "If it is found that there was a fraud on the court, the judgment should be vacated and the guilty party denied all relief. The entire cost of proceedings, including attorneys' fees, may be assessed against that party." "The court continues to have ancillary jurisdiction to determine whether it has been the victim of a fraud." "Almost all of the principles that govern a claim of fraud on the court are derivable from the Hazel-Atlas case." Federal Practice and Procedure, WRIGHT — MILLER — KANE, with (emphasis added) to Hazel – Atlas Glass Company v. Hartford Empire Company 1944, 64 S.Ct 997, 322 U.S. 238, 88 L. Ed. 1250.

{SKIP TO PAGE 13 OF THE MEMORANDUM}

MISREPRESENTATIONS OF MATERIAL FACTS AND FRAUD UPON THE COURT

(COMPLAINTS ARE NOT IDENTICAL)

Page 1. of Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss, or, in the Alternative, For Summary Judgement filed June 22, 1998 in Superior Court of the District of Columbia Civil Division:

Defendant/District of Columbia states:
Page 1

"On May 21, 1998, Plaintiff filed his complaint in the above-captioned matter alleging, inter alia, that he was subjected to harassment by the District of Columbia Metropolitan Police Department. On May 22, 1998, Plaintiff filed a virtually ***identical complaint*** in the case of *Johnson v. O'Boyle* C.A. 98-3875, in which he also alleged that he was the victim of police harassment. (A copy of the

complaint in Johnson v. O'Boyle' C.A. no 98-3875 is attached hereto as Exhibit #1). On May 26, 1998, a hearing was held on Plaintiff's motion for a temporary restraining order in the *O'Boyle* case. At that hearing, Judge Zinora Rankin denied Plaintiff's motion for a temporary restraining order and dismissed Plaintiff's complaint with prejudice."

The Defendant/District of Columbia committed a "fraud upon the court" when it misrepresented facts in order to obtain a dismissal order from SUPERIOR COURT JUDGE J. GARDNER. (1) In contrast to what the defendant has represented to the court the complaint in the temporary restraining order request *Johnson v. O'Boyle* C.A. 98-3875 and the complaint in Kenneth W. Johnson v. DC Metropolitan Police Dept., Marrion Barry Jr. Mayor of the District of Columbia, and Corporation Council of the District of Columbia —Janice Stokes, 441 4th street. N.W. Wash, or otherwise described by the defendant as Kenneth W. Johnson v. "D.C. Metropolitan Police Department" (SIC) C.A. No. 98-3837. **WERE NOT IDENTICAL COMPLAINTS (EMPHASIS ADDED.** In order to see the difference the Plaintiff request the court to examine C.A. 98-3837[1] against C.A. 98-3875[2]..... Defendant's statement to the Superior Court (Judge Gardner) that the two complaints are identical in order to induce the court to rule res judicata, collateral estoppel, issue preclusion, was a "fraud upon the court". (Emphasis added) Quoting the defendant page 1 from above: Plaintiff filed a virtually identical complaint". Rlue 60(b) states in relevant part:

> **This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or**

---

[1] See Exhibit P "C.A. 98-3837 in the complaints in the appropriate order in which Plaintiff filed them"

[2] See Exhibit Q "C.A. 98-3875 the TRO request"

grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court.

{SKIP TO PAGE 16 OF THE MEMORANDUM IN SUPPORT OF THE RULE 60(b) FRAUD UPON THE COURT MOTION}

Page 1. of Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss, or, in the Alternative, For Summary Judgement filed June 22, 1998 in Superior Court of the District of Columbia Civil Division:

Page 1 and 2
The Defendant/District of Columbia states: "***The only defendant that Plaintiff has named in the instant case is the Metropolitan Police Depart ment.***

{SKIP "BACKWARD" TO PAGE 5 OF THE MEMORANDUM IN SUPPORT OF THE RULE 60(b) FRAUD UPON THE COURT MOTION}

"These frauds upon the court and Plaintiff were perpetrated by the defendant through the Corporation Counsel attorneys who formerly represented defendant in Johnson I:

James A. DeVita # 370578,
Assistant Corporation Counsel, D.C.,
1 Judiciary Square, Room 5-86,
441 4th Street, N.W., 6th Floor,
Washington D.C. 20001.
John Ferren,
Corporation Counsel, D.C.
Martin L. Grossman,

Deputy Corporation Counsel,
Civil Division.
Arabella Teal,
Chief General Litigation Section I.